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THE LAW

RELATING TO

FREIGHT

BY

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AND COURT-MARTIAL PROCEDURE," ETC.

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INTRODUCTION

ALTHOUGH there is no diminution in the number of legal practitioners, there is an increasing desire on the part of business men to know something of "how they stand" in certain circumstances without having recourse to their solicitors. They do not, however, wish to go to the expense of costly Law books, and it is even possible some of them recognise that were they to do so, the last state would be worse than the first. What they desire is *the Law laid down plainly and concisely*, in volumes which are neither bulky nor expensive. This is particularly the position in Shipping affairs, where all concerned in the industry—be they Owners, Brokers, Merchants or Officers—are almost daily confronted with some legal problem or another, small perhaps in itself, but yet of importance to them.

To meet this demand, The Syren & Shipping, Limited, have decided to issue a series of "Hand-books on Shipping Law." These, it is hoped, will fulfil the desired conditions; but in aiming at brevity and moderate cost, the absolute necessity of accuracy will be kept fully in mind, so that in consulting any of the series the inquirer will have no cause to fear that what he finds within its covers will lead him on the path which he should not take.

The success attending the first volume of the series—*The Law relating to Demurrage*—was so pronounced that it was deemed advisable to lose no time in preparing the second Hand-book

of the series. It deals with the Law of Freight, and as no less care has been bestowed on its preparation, no doubt it will meet with an equally gratifying reception at the hands of the very large section of the business community to whom it will appeal.

THE SYREN & SHIPPING,
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93 LEADENHALL STREET,
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PREFACE

OWING to the very favourable reception accorded both by reviewers and the mercantile community to my work on Demurrage, I have been encouraged to prepare another work on similar lines dealing with the Law of Freight, a subject of equal importance to merchants and shipowners with that of demurrage. I have adhered to the plan adopted in my previous work of giving the facts upon which each case has been decided, together with quotations from some of the judgments in the more important cases, for the law relating both to demurrage and freight consists, to all intents and purposes, wholly of what is termed judge-made law. This judge-made law is contained in many hundreds of volumes of decided cases, which only a lawyer with a complete legal library can have access to, whilst they are wholly inaccessible to the ordinary layman. By giving references to all the known decisions on the subject, as well as selections from the Scotch and American Courts, lawyers who are within reach of a complete legal library are shown the way to a thorough investigation of the subject; whilst for those to whom few books are accessible, or who have not the time to examine them, I have given the best conclusion to which a study of the question has led me, and upon the most important questions, the very words in which the different Courts have stated the law.

From an immemorial period in the English law

the doctrine of the authoritative force of judicial precedent has been part of it—a feature which is peculiar to the English and American systems of law. The doctrine as established is shortly this, that a decision by a Court of competent jurisdiction of a point of law, lying so squarely in the pathway of judicial judgment that the case could not have been adjudged without deciding it, is not only binding upon the parties to the cause in judgment, but the point so decided becomes, until it is reversed or overruled, not merely evidence of what the law is in a like case, but *the very law itself*, which the Courts are bound to follow and apply not only in cases precisely like the one which was first determined, but also to those which, however different in their origin or special circumstances, stand upon the same principle. In other countries of Europe a judicial decision has no such authoritative force in any other case, whether in the same or any other Court. The reports of the decided cases embody the learning, wisdom, and experience of the judges, often men of great intellectual powers, who during a long period have made the law the subject of lifelong and profound study. The value of the reports to the lawyer and the judge is absolutely incalculable. They are a mine of wealth possessed by none but the English-speaking race. They are capable of being made quite as valuable to the legislator as to the lawyer, since the uninterrupted light of the experience of many generations of men shines

forth from them to make out and illumine the legislator's pathway.

No law-book, however well written, can exactly state the law applicable to every case that may arise. Even were the law codified, it could never be a reading-made-easy for the public. As every section in the code would be of equal authority, no layman, by reading one part only, could be sure that his induction was sufficiently copious. A code would not do away with the necessity of lawyers: it has not done away with them in those countries where codes have been adopted. Neither can a law-book, dealing with only one branch of law, do away with the necessity for the layman to consult his lawyer on points arising of an unusual character: it can merely explain to the layman the ordinary rules of law relating to that particular branch. To draw inferences from the rules of law laid down in a code or in a text-book in cases of an unusual character, and apply them to the particular case, is the work of one skilled in the law.

J. E. R. STEPHENS.

2 ESSEX COURT,
TEMPLE, E.C.,
October 1907.

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CHAPTER I

DEFINITIONS

Freight

"FREIGHT," as used in a policy of marine insurance, "imports the benefit derived from the employment of the ship" (1), so that description covers the monthly hire of the ship for time. "'Freight' is the value of the use of the ship" (2). "In my opinion," said Mellish, L.J., "nothing is 'freight' unless there is involved in it a contract to carry; for freight is a sum payable in respect of a contract to carry, and if there is no contract to carry, then, although the sum to be paid may be called freight, it is not in point of law freight within the rule that the mortgagee is entitled to the accruing freight" (3). "Freight, according to the dictionaries, includes (*a*) the cargo; (*b*) the actual transport from one place to another; (*c*) the hire of the ship, or part of it, or the charge for the transport of goods therein. It may by extension include the passengers, or even passage money, as, for instance, upon a question arising upon the now abandoned maxim that 'Freight

Meaning of.

(1) Per Lord Tenterden, *Flint* v. *Flemyng*, 1 B. and Ad. 48.

(2) Per Day, J., *Gayner* v. *Sunderland*, Cab. and El. 295.

(3) Per Mellish, L.J., *Keith* v. *Burrows*, 2 C.P.D. 167; affirmed by H.L. 2 A.C. 636.

is the mother of wages,' or upon a question of sale or capture or abandonment, because the passage money is equally with the freight of goods an incident or accessory of the ship. Accordingly, Chancellor Kent (1) states that, 'Freight, in the common acceptation of the term, means the prices for the actual transportation of goods by sea from one place to another; but in its more extensive sense it is applied to all rewards or compensation paid for the use of ships, including the transportation of passengers.' And he refers to *Giles* v. *The Cynthia* (2), in which the question arose upon a claim to wages. And in *Mulloy* v. *Backer* (3) Lawrence, J., said: 'Foreign writers consider passage money the same as freight'; and Lord Ellenborough added: 'Except for the purpose of lien, it means the same thing'" (4). But, generally speaking, "freight is applicable to goods only" (5).

In an undertaking to give bail for the value of a ship in her damaged condition and her "freight," that means the whole freight due without deducting the expenses of earning it (6). There is no loss of "freight" within a marine insurance, if, having been earned, the charterers are entitled to, and do, withhold it as a mulct or forfeit (7). Otherwise, if the right to the mulct or forfeiture arises from the happening of one of the perils insured against (8).

It must be remembered that the word "freight" does not always relate to the same sort of payment. For propositions of law relating to freight in one sense, do not always apply to it in the other.

No payment for partial conveyance.

The contract for the conveyance of merchandise is in its nature an entire contract, and unless it be completely performed by the delivery of the goods at the place of destination, the merchant will, in general, derive no

(1) 3 Com., 7th Edit., 296. (2) 1 Peters' Adm. 206. (3) 5 East. 321.
(4) Per Willes, J., *Denoon* v. *Home and Colonial Assurance*, 41 L.J. C.P. 168.
(5) *Lewis* v. *Marshall*, 13 L.J. C.P. 193. See also *Sweeting* v. *Darthez*, 23 L.J. C.P. 131; *Williams* v. *North China Insurance*, 1 C.P.D. 757.
(6) *The Gemma*, 14 T.L.R. 444.
(7) *Inman Company* v. *Bischoff*, 52 L.J. Q.B. 169.
(8) *The Alps*, 1893, P. 109.

benefit from the time and labour expended in a partial conveyance, and consequently be subject to no payment whatever, although the ship may have been hired by the month or week. The cases in which a partial payment may be claimed are exceptions to the general rule, founded upon principles of equity and justice, as applicable to particular circumstances. On the other hand, an interruption of the regular course of the voyage happening without the fault of the owner, does not deprive him of his freight, if the ship afterwards proceed with the cargo to the place of destination, as in the case of capture and recapture (1). But although the delivery of the goods at the place of destination is in general necessary to entitle the owner to the freight, yet with respect to living animals, whether men or cattle, which may frequently die during the voyage, without any fault or neglect of the persons belonging to the ship, it is said that if there be no express agreement whether the freight is to be paid for the lading, or for the transporting them, freight shall be paid as well for the dead as for the living; if the agreement be to pay freight for the lading them, their death cannot deprive the owners of the freight; but if the agreement be to pay freight for transporting them, then no freight is due for those that die on the voyage, because as to them the contract is not performed. These distinctions are found in the Roman law, and adopted by all the writers on this subject (2).

Exceptions.

Where interruption not caused by owner.

Cattle dying on voyage.

There has been from time to time considerable discussion as to the meaning which ought to be given to the word "freight" when used in charter-parties, bills of lading, and policies of insurance.

In the case of *Allison* v. *Bristol Marine Insurance Company* (3), there was a considerable difference of opinion on this point among the judges, both in the courts below

(1) *The Race Horse*, 1800, 3 Rob A.R. 101. And see *Beale* v. *Thompson*, 3 Bos. and P. 420, p. 431; *Curling* v. *Long* (1797), 1 Bos. and P. 637.

(2) Dig. 14, 2, 10. See Abbott on Shipping, 5th Edit., p. 274; 14th Edit., p. 658; *Molloy*, Book 2, chap. 4, sect. 8. See also *Moffat* v. *East India Company* (1809), 10 East. 468.

(3) 1 A.C. 209.

and when called upon to advise the House of Lords, and eventually that House reversed the judgment of the majority of the Court of Exchequer Chamber. In this case a ship was chartered to sail from Greenock to Bombay, to carry a cargo of coals. Freight was to be paid on unloading and right delivery of the cargo at and after the rate of 42s. per ton on the quantity delivered. It was provided that "such freight is to be paid, say one half in cash on signing bills of lading, less four months' interest at bank rate, but not less than 5 per cent. per annum, 5 per cent. for insurance, and 2½ per cent. on gross amount of freight in lieu of consignment at Bombay, and the remainder on right delivery of the cargo, less cost of coals short delivered, in cash, at current rates of exchange for bills on London at six months' sight." Half of the estimated amount of the freight was paid in London. The shipowner effected two insurances, one for £500 "on freight valued at £2000," the other for £700 "on freight payable abroad valued at £2000." The ship was lost before entering Bombay harbour, but one-half of the cargo was saved and delivered. The master, in the belief that the prepayment had satisfied the freight on this behalf so delivered, made no demand on the charterer. The shipowner claimed on his policies as for a total loss of the other half of the freight. It was held by the House of Lords that on the proper construction of the policy the whole sum agreed upon constituted freight; that half of the whole sum of that freight had been paid in England; that it was not a prepayment of half the rate of freight calculated as distributed over the whole cargo, but of half the whole gross freight; that half of the whole remained to be paid abroad on right delivery of the cargo; that that half had been lost through perils of the sea, and that the shipowner was entitled on his policies on freight to recover as for the total loss of that half.

Lord Blackburn, in advising the House of Lords to the contrary, thus defined "freight" (1):—"Freight is the reward payable to the carrier for the safe carriage and

(1) At p. 228.

delivery of goods ; it is payable only on the safe carriage and delivery; if the goods are lost on the voyage, nothing is payable ; and in cases where the freight is made payable at so much per ton of the goods, and part of the goods only are delivered, a proportionate part of the freight only is payable. But a sum of money payable by the shippers of the goods at the port of shipment does not acquire the legal character of freight because it is described under that name in a charter-party. It is, in effect, money to be paid for taking the goods on board, and undertaking to carry, and not for carrying them. This, which I have taken, with a slight variation, from the judgment of Lord Kingsdown in *Kirchner* v. *Venus* (1), in my opinion, is an accurate statement of the law." But Lord Esher, who had previously advised the House, put another interpretation on Lord Kingsdown's language. He said (2): "It becomes necessary, in consequence of the argument founded on them, to consider the true import of the oft-quoted words of Lord Kingsdown in *Kirchner* v. *Venus*. In that case there was no dispute that the freight was payable by the shipper in advance. It was agreed that it should be paid by him in advance at Liverpool. The port of discharge was Sydney. The bills of lading were endorsed for value. The shipper did not make the stipulated payment in advance. The captain at Sydney, claiming a lien on the cargo for freight, refused to deliver the cargo to the assignee of the bill of lading without payment by him of the freight. The advice of the Council was that there was no lien. It was not necessary to say that advance freight was not freight at all. It was only necessary to say that the incident of lien did not attach to freight so to be paid. And I think that the latter is all that is said by Lord Kingsdown. He does not say that the money payable in advance is not freight at all. Contrasting the characteristics or incidents of the money agreed to be paid in advance for the carriage of goods in a ship with those of money to be paid on delivery of the goods,

Lord Kingsdown's definition of "freight" in *Kirchner* v. *Venus*, as interpreted by Lord Blackburn.

Lord Kingsdown's definition of "freight," interpreted by Lord Esher.

(1) 1859, 12 Mos. N.C. 390. (2) 1 A.C., at p. 224.

he says that the first does not acquire the legal character of the other, nor does it acquire its legal incidents. By the first, he is alluding to the characteristic of freight not being payable till earned by carriage, and by the second, to the incident of lien. So, in the next phrase, he does not say that the money is paid for the taking the goods on board, etc., but that it is so in effect. He did not mean to say that prepaid freight, or money to be paid in advance of freight, is not freight, or a part of the freight for the carriage of goods; otherwise, in the first place, he would, if the whole freight were to be prepaid, leave it, that the cargo was to be carried on the voyage for nothing, and indeed, as it would seem, that there would be no contract to carry on the voyage; and in the second place, at least, he would reduce such advance to a loan, and so hold in contravention of all the cases. The decision is, that where the agreed time of payment of the freight is not contemporaneous with the time of delivery of the cargo, there is no implied right of lien. The observations of Lord Kingsdown are pointed to that question. The true meaning of them is that, so far as concerns a question of nothing being done until delivery, or a question of lien, it is the same, in effect, as if the money were to be paid for taking the goods on board, etc., and as if it were not to be paid for carrying them." This view of the effect of Lord Kingsdown's opinion was approved by Lord Hatherley (1) who said: "What Lord Kingsdown there says is this: in the first place, it is not that prepayments are not freight, but that they are not the same thing as freight, having all the legal incidents of freight" (2).

No lien where payment is not to be on delivery.

Judgment of the House of Lords.

And in *The Norway* (3), where the ship was chartered for a voyage from Liverpool to Calcutta with salt, and home from one of the rice ports with rice, and was to be paid a lump sum for the voyage. Sir E. V. Williams, delivering the judgment of the Privy Council, said (4):

(1) 1 A.C., p. 239.

(2) See the observations of Vaughan Williams, L.J., in *Weir & Co.* v. *Girvin & Co.* [1900], 1 Q.B. 52.

(3) 1865, Br. and L. 404.

(4) At p. 408.

"Although the lump sum is called 'freight' in the charter and bills of lading, yet we think it is not properly so called; but that it is more properly a sum in the nature of a rent, to be paid for the use and hire of the ship on the agreed voyages." Lump freight not freight.

Lord Chief-Justice Tindal, who delivered the considered judgment of the Court in *Lewis* v. *Marshall* (1) said: "The words 'cargo' and 'freight' do, *prima facie*, and in their natural and ordinary meaning, refer to goods only. And where in the same document occur the words 'cabin passengers' and 'passage money,' and a contract is made respecting them between the same parties who make the contract respecting the cargo and freight, the inference is almost irresistible, that the former words were not intended, within the meaning of the contracting parties, to comprise passengers and passage money of any description; the parties showing themselves capable of making a contract as to passengers, by their proper and specific terms." Passsage money not freight. Mercantile usage.

In *R.* v. *Judge of the City of London Court* (2) it was held that the personal luggage of a passenger on board ship, which is carried with him as a privilege incidental to the contract to convey the passenger himself, is not "goods" within section 2 of the County Courts Admiralty Jurisdiction Amendment Act 1869. Personal luggage of passenger, carried with him, not goods.

In *Denoon* v. *Home and Colonial Assurance Company* (3) an action was brought on a policy of insurance upon freight on a voyage from Calcutta to the Mauritius. The policy was upon "chartered freight valued at £7000 at and from Sydney to Calcutta and London." Defendants underwrote the policy for £1000. On arrival of the ship at Calcutta the charterers stopped payment, and the ship conveyed a cargo consisting of coolies and rice to the Mauritius. Plaintiff got the policy altered, and the interest in freight to be valued at £2000, the sum insured by the underwriter being the same. Plaintiff did not inform the underwriters of his Meaning of "freight" in insurance policies.

(1) 1844, 13 L.J. C.P. 193. (2) 1883, 5 Asp. M.C. 283.
(3) 1872, 1 Asp. M.C. 309.

intention to convey the coolies. The ship took coolies and rice to the Mauritius, the freight of the rice being valued at £1412. The vessel was wrecked near the Mauritius and several coolies drowned, the rice being totally lost. The plaintiff claimed as on a total loss, the passage money of the coolies not being "freight" within the policy. The defendants insisted that the passage of the coolies was "freight" insured by the policy, and that they were liable to a proportionate part of the sum assured against. It was held by the Court of Common Pleas that the passage money of the coolies was not freight within the policy. It was held also, that the policy as applicable to a partial cargo was an open policy for one-half the loss of freight not in any case exceeding £1000, and that as £1412, the freight of the rice, was lost, the underwriters were liable for one-half the value of the freight of the rice, viz. £706. Mr Justice Willes, in delivering the judgment of the Court, referred to the fact that no trace of passage money being treated as freight, for the purpose of insurance, was to be found in the reported cases; but the ground of the decision seems rather to have been that the rate of insurance for passage money of coolies, on the voyage in question, was proved to be lower than the rate for freight of cargo on the same voyage, and that the terms of the policy were applicable to freight rather than passage money.

Advance Freight—Freight payable in Advance

Advance freight not recoverable.

The right of the shipowner by English law to retain advanced freight, notwithstanding the loss of the goods before the freight is earned, seems never to have been seriously doubted. Although Lord Chief-Justice Cockburn criticised this state of the law in the case of *Byrne* v. *Schiller* (1), saying: "I think it founded on an erroneous principle, and anything but satisfactory; and I am emboldened to say this by finding that the American authorities have settled the law upon directly

English law as to advance freight contrary to European law.

(1) 1871, L.R. 6 Ex. 319, 325.

opposite principles, and that the law of every European country is in conformity with the American doctrine and contrary to ours," yet his lordship admitted that the authorities were too strong to be overcome, and that the law could only be altered by the legislature, and not by contrary decisions. In this view the other members of the Court concurred.

And in the subsequent case of *Allison* v. *Bristol Marine Insurance Company* (1), this rule of English law was unanimously recognised in the House of Lords. Lord Penzance said (2): "But then, it is said, a payment of freight in advance cannot be recovered back if the goods do not arrive, and that this has been held for good law in successive cases. This, at least, shows that such an advance is not unfamiliar, either to the commercial community or the courts of law; and as to the injustice of it, the provisions of the present charter-party show how easily and simply any injustice is practically avoided. An advance of freight is nothing more than an arrangement for the convenience of the shipowner who wants an advance, and if the merchant will make it, is willing to pay the cost of insuring the advance when made, thus practically taking upon himself in another form the risk which properly belongs to him of the freight never being earned at all."

Advance freight payable where ship lost.

Advance freight is payable at the stipulated time, and the loss of the ship is immaterial; but if the advance freight is so payable "if required," then the demand for it comes too late after the ship is lost.

In *The Oriental Steamship Company* v. *Tylor* (3) a cargo was shipped under a charter-party which contained the following clause: "The freight to be paid as follows —one-third on signing bills of lading, less 3 per cent. for interest, insurance, etc., and the remainder on unloading in cash." Bills of lading were to be signed within twenty-four hours after the cargo was on board. After the commencement of the voyage, and before bills of lading were signed, the vessel sank and the cargo was lost. The charterers thereupon refused to

(1) 1876, 1 A.C. 209. (2) 1876, 1 A.C., p. 244. (3) 1893, 2 Q.B. 518.

present bills of lading for signature, and the shipowner sued them for breach of the charter-party in so refusing. It was held by the Court of Appeal that the loss of the cargo did not relieve the charterers from their liability to present bills of lading, and that the shipowner was entitled to recover damages equal to the amount of the advance freight.

In *Weir* v. *Girvin* (1) the freight was to be at a certain rate per ton of the quantity delivered to the consignees, but it was to be "due and paid as follows: two-thirds in cash three days after sailing from the Tyne, ship lost or not lost, and the balance on unloading and right delivery of the cargo." During the loading, part of the cargo, already shipped, was destroyed by fire. The charterers loaded the balance of the cargo, and the ship sailed. It was held that the two-thirds advanced freight was only to be paid on the quantity of cargo to be delivered to the consignees; and, as at the time when the payment became due it was known that the destroyed portion would not be delivered, no advance freight was payable on that portion. A payment of advance freight is really a payment on account of freight. In other words, freight has the same meaning whether it is payable as advance freight or not, although, of course, the parties may make such stipulations regulating its payment as they think fit. If the clause stipulating for advance freight is optional and not obligatory, the shipowner is not bound to ask for the advance freight, and the charterers cannot deduct from the freight discounts that they would have received if the advance freight had been paid before the completion of the voyage (2).

Advance freight "if required."

In *Smith, Hill & Co.* v. *Pyman* (3) a cargo was shipped under a charter-party which contained the following clause: "One-third freight, if required to be advanced, less 3 per cent. for interest and insurance." Shortly after the commencement of the voyage, the

(1) 1900, 1 Q.B. 45. See also *Aitken, Lilburn & Co.* v. *Ernsthausen & Co.* [1894], 19 B. 773.

(2) *The Primula*, 1894, P. 128.

(3) 1891, 1 Q.B. 742.

vessel was wrecked and the cargo lost. Subsequently to the loss, and not before, the shipowner required payment of advance freight under the above clause. It was held by the Court of Appeal that the requirement by the shipowner was a condition precedent to the liability of the charterer to pay advance freight, that the requirement was made too late, and that the charterer was not liable. Lord Esher, M.R., said: "If the ship had never arrived, or the cargo had never been delivered, no freight would have been payable at all. But there is a stipulation in the charter-party that part of that freight may be payable in advance; in other words, the advance freight is part of the freight. Now there are two peculiarities of the English law as regards freight: first, that if part of the freight is advanced and the ship is lost, or the goods are lost, the part so advanced, although really not due under the terms of the contract unless there has been delivery of the goods, nevertheless cannot be recovered back by the charterer from the shipowner; and secondly, that if there is no stipulation to the contrary, but only a stipulation that there shall be advance freight, it is payable at the moment of starting, and even if not paid can be recovered by the shipowner from the charterer upon the loss of the ship. These rules of law are in favour of the shipowner, and they are well-known rules; and the parties in the present case, knowing the law, have not left out of the charter-party the clause relating to advance freight as it appears in its ordinary form, but have altered it. The alteration they have made is in favour of the charterer, and in effect provides that though there is to be advance freight, it is not to be due at the moment of starting, but only if and when the shipowner requires it. To say otherwise would be to strike the words 'if required' out of the charter-party altogether, and make them mere surplusage; but giving the only reasonable interpretation I can to them, it seems that they are inserted for the protection of the charterer, and the words which follow show that they were inserted for a particular reason. The words 'if

Advance freight payable at moment of starting.

Advance freight "if required."

required ' amount to a stipulation by which the requirement on the part of the shipowner is made a condition precedent to the charterer's liability to pay advance freight at all ; if there were no such words, the charterer would become liable for advance freight at once upon shipment of the cargo. These words are a stipulation that his liability shall not arise then, but only if the shipowner requires payment. This the shipowner is of course not bound to do ; but if he does so, the charterer becomes liable. It may easily be seen to what extent this stipulation is in the charterer's favour. Until he becomes liable to pay the advance freight, he has no insurable interest in it ; he has no insurable interest in any freight except that which he is actually liable to pay " (1).

Freight in advance subject to insurance.

The stipulation in a charter-party, that freight shall be paid "subject to insurance," means merely that freight is to be paid subject to deduction for premiums on insurances, but not that insurance by the owner is a condition precedent to his recovery of freight (2). When the charterers of a ship stipulate that they shall be entitled to insure their advances "against freight," at the owner's expense, and where they fail to insure, they have, in the event of the ship perishing, no claim against the owners for repayment (3). From the moment advance freight becomes payable it cannot be insured by the shipowner. It is due at that moment, and the liability of the person from whom it is due does not depend whether or not the ship arrives at her destination or upon any vicissitude of the voyage, but the person who is liable to pay the advance freight can insure it (4).

In *Rodocanachi* v. *Milburn* (5) charterers were to make advances "on account of freight at current exchanges

(1) Per Lord Esher, M.R., *Smith* v. *Pyman*, 1891, 1 Q.B. 743. See also *Blakey* v. *Dixon*, 2 B. and P. 321 ; *Kirchner* v. *Venus*, 12 Moo. P.C. 361 ; *Andrews* v. *Moorhouse*, 5 Taump. 435 ; *Great Indian Pen. Rail. Co.* v. *Turnbull*, 53 L.T. 325.

(2) *Jackson* v. *Isaacson*, 1858, 27 L.J. Ex. 392.

(3) *Watson* v. *Shankland* (L.R. 2 H.L. (Sc.) 304).

(4) *Oriental Steamship Co.* v. *Tylor*, 1893, 2 Q.B. 518.

(5) 18 Q.B.D. 67.

subject to insurance only." They did so, and the cost of insurance was allowed to them. On the voyage the cargo was lost by the negligence of the master, and the question arose whether, in calculating the damages payable by the shipowner, deduction should be made from the arrived value of the cargo of the *whole* of the charter freight, or only of the freight which remained unpaid. It was held by the Court of Appeal, reversing the judgment of Manisty, J., that in estimating the damages for non-delivery of the cargo, only the unpaid freight must be deducted from the market value of the goods, not the advanced freight as well.

In *Dufourcet* v. *Bishop* (1) goods were shipped on the defendants' ship under a charter-party which provided that, if required, the whole freight should be advanced subject to deduction for interest and insurance. The freight was paid in advance, and the amount was insured. The charterers sold the goods to the plaintiffs at a price covering cost, freight, and insurance. The cargo was lost by the negligence of the defendants. In an action for the loss of the goods, it was held by Denman, J., following the previous case of *Rodocanachi* v. *Milburn*, that the plaintiffs were entitled to recover as part of the damages sustained by them the amount of the advanced freight, which was included in the price paid by them for the goods, for the insurers of the freight who had indemnified the plaintiffs were entitled to be subrogated to the rights of the plaintiffs in respect of the advanced freight, and to have the action maintained for their benefit for the amount insured, as it would, but for the insurance, have formed part of the damages to which the plaintiffs would have been entitled. Although the merchant cannot recover from the shipowner money he has paid as advanced freight, on the loss of the cargo, yet, when such loss has arisen from the default of the shipowner or his servants, the merchant may recover the same sum as damages. If the merchant bases his claim on the market value of the cargo at the port of discharge, the advanced freight will not be deducted

(1) 1886, 18 Q.B.D. 373

from it; but if he bases it on the cost of the cargo at the port of loading, then the advanced freight may be added to it.

In *Great Indian Peninsula Railway Company* v. *Turnbull* (1) goods were shipped under a charter-party containing the following stipulation: "Four-fifths of the freight (calculated on the quantity shipped) to be advanced and paid in cash in one month from the steamer's sailing from her last port in Great Britain (steamer lost or not lost)." The steamer sailed on the 12th July; was lost through the negligence of her master on the 19th July; the loss was known on the 21st July; on the 26th July the charterer paid four-fifths of the freight to the shipowner. In an action by the charterer against the shipowner to recover damages for breach of contract, it was held that, notwithstanding the clause "steamer lost or not lost," the charterer was entitled to take into account and recover the advance freight so paid and the premiums of insurance, in addition to the prime cost of the goods.

Distinction between freight and advances.

A difficulty has sometimes arisen in distinguishing in charter-parties between advances of cash to meet ship's expenses and prepayment of freight. Where it is stipulated that the charterer shall provide cash for the ship's disbursements at the port of loading, the cash so provided is in the nature of a loan to the shipowner, and is repayable by him in any event. If the cargo arrives at its destination, these advances may be conveniently set against the freight, but the repayment does not depend upon the freight being earned. On the other hand, if freight is to be paid in advance, it can in no case be recovered. Where that is stipulated for, the intention of the parties is understood to be that that part of the hire of the ship is to be paid beforehand, and irrevocably (2).

In *De Silvale* v. *Kendall* (3) there was a covenant in a charter-party, made between the master of the ship and the freighter, upon a voyage from L. to M. and thence

(1) 1885, 5 Asp. M.C. 465. (2) Carver on Carriage by Sea, sect. 564.
(3) 1815, 4 M. and S. 37.

back to L., that the freighter should pay for the freight from L. to M. £120, and from M. to L. at the rate of 2½d. per lb. for cotton which should be delivered at L., such freight to be paid as follows, viz.: £120 for freight of the outward cargo to M., and as much cash as might be found necessary for the vessel's disbursements in M., to be advanced by the freighter, his agents or assigns, to the master, when required, free from interest and commission, at the current exchange of the place, and the residue of such freight to be paid on delivery of the cargo in L. The ship arrived at M., where the £120 outward freight, and also £192 for the necessary disbursements of the ship, were paid or advanced by the freighter to the master; and the ship received her homeward cargo and sailed for L., but was lost by capture. It was held that the freighter was not entitled to recover back the £192.

In *Saunders* v. *Drew* (1), by a charter-party of affreightment for a voyage from the port of London to Calcutta and back, on the usual terms, it was agreed that the freighter, if he thought proper, might hire the vessel for an intermediate voyage, within certain limits, for not less than six months; that, in that event, the master should refit the vessel for such voyage, and the complement of men should be kept up, and all necessaries provided; in consideration of which the freighter agreed to pay the owner for such voyage at the rate of £1 a ton per month on the ship's tonnage, and to pay four months of such hire in advance, and at the end of six months two further months' pay, and so in every succeeding two months, and the balance due at the termination of such hiring, in cash or approved bills. It was also stipulated that, if the vessel should be lost or captured, the freight by time should be payable up to the period when she should be so lost or captured or last heard of. It was held that, under the former clauses of this agreement, the freighter could not claim a return of any part of the four months'

(1) 1832, 3 B. and Ad. 445. See also *Civil Service Co-operative Society* v. *G.S.N. Co.* (1903), 2 K.B. 756.

advance, on the vessel being lost within that period; but that the advance, being in respect of freight, was absolute, and that the stipulation on this head was not qualified by the subsequent clause.

In *Trayes* v. *Worms* (1) the defendant chartered a vessel, freight to be paid in bills at six months' date from the date of sailing or in cash (less discount equal thereto), less, in either case, the cost of insurance, to be effected by charterers at ship's expense, and also £800 to be paid on delivery of cargo. It was held, that such advanced freight was not to be returned, and that the defendant was liable to contribute to general average in respect thereof.

In *Manfield* v. *Maitland* (2), where the memorandum for charter stated that one-half of the freight was to be paid in cash on unloading and right delivery, and the remainder by bill on London at four months' date; and then, after containing stipulations for unloading, discharging, demurrage, etc., added, "the captain to be supplied with cash for the ship's use," and in pursuance of the last stipulation the master drew a bill on the freighters, which was duly accepted and paid, it was held that this was not to be considered as a payment of freight in advance, but as a loan to the owner of the ship, and that (the ship having been lost on her homeward voyage) the freighters had no insurable interest in such bill.

Lord Esher distinguishes the cases of *De Silvale* v. *Kendall* and *Manfield* v. *Maitland*.

Lord Esher, when he addressed the House of Lords in *Allison* v. *Bristol Marine Insurance Company* (3), elaborately discussed the cases on the subject, and among others he pointed out the difference between *De Silvale* v. *Kendall* and *Manfield* v. *Maitland*. Of the former Lord Esher said (3): "In order to interpret the charter-party, all the judges rely upon the phrases, 'such freight to be paid as follows,' and 'the residue of such freight to be paid, etc.' They also, it is true, rely upon the stipulation that the advance is to be 'free from interest and commission.' What effect

(1) 1865, 34 L.J. C.P. 274. (2) 1821, 4 B. and Ald. 582.
(3) 1876, 1 A.C. 217, 220, 224.

the latter stipulation has will be seen in subsequent cases." Of *Manfield* v. *Maitland*, his lordship said: "In that charter-party it will be observed the whole of the freight was made payable on the unloading and right delivery; half of it was to be paid then in cash, and half then by bill to be then given. The stipulation as to the advance was not incorporated into a sentence headed 'such freight to be paid, etc.' There were no such words as 'the residue of such freight to be paid on delivery, etc.'"

The next case, however, shows that *Manfield* v. *Maitland* only governs where such a clause, making the freight payable on the unloading, etc., is unqualified by any other clause. In *Hicks* v. *Shield* (1) the charter-party was between the plaintiff as charterer and the defendants as owners, to carry rice from Rangoon to London, and there deliver the same, on being paid freight as follows: £5, 5s. per ton net rice delivered, etc. "Cash for ship's disbursements to be advanced," to the extent of £300, free of interest, but "subject to insurance," and 2½ per cent. commission in full of port and pilotage charges, etc. The freight to be paid on unloading and right delivery, etc. The plaintiff advanced £300, and the ship was lost. The question was, whether the defendant was bound to repay the whole or any part. It was agreed that the advance was a mere loan. It was held otherwise, because of the indication, arising from the stipulation that the advance might be insured. "The only question," says Lord Campbell, "is whether this was a mere loan or an advance of freight. A sum of £300 is to be advanced, subject to certain deductions, one of which is for insurance. If it is to be insured, it must be for freight in advance, for a mere loan could not be insured; and if it is not a mere loan, but advance of freight, the plaintiff cannot recover it back." He also said: "Now the mere mention of insurance seems to me to stamp the transaction indelibly as a payment on account of freight, and not a mere loan; for if the

Loan or advance of freight.

(1) 7 El. and Bl. 633.

advance was to be insured, it must have been an advance of freight, which is insurable, whereas a loan is not." His lordship added of a clause like the one in *Manfield* v. *Maitland*: "There is nothing necessarily inconsistent in the other clause that 'the freight is to be paid on unloading and right delivery of cargo.' This may refer to the payment of the residue of the freight not already advanced "(1). Crompton, J., pointed out that if it was a loan, it could not be insured either by the charterer or the shipowners; neither would be subject to loss by sea risk. In that case the stipulation as to insurance was relied on, in the absence of such phrases as "such freight to be paid as follows," and "the residue of such freight to be paid on delivery." With regard to this case Lord Esher said in *Allison* v. *Bristol Marine Insurance Company* (2): "It is an authority as to the effect of the stipulation as to insurance, and shows that the effect is, that it indicates that the advance is an advance of freight, and is not by way of loan. Again, there is no allusion to the idea of each party bearing half the loss."

Mention of insurance stamps the transaction as payment on account of freight, and not a mere loan.

The decision of *Hicks* v. *Shield* as to the effect of the shipowner paying insurance is supported by *Allison* v. *Bristol Marine Insurance Company*, where Lord Chelmsford said (3): "The charter-party contains a provision for the charterer to deduct from the payment of half freight" (the advance in question) "5 per cent. for insurance; and Mr Justice Blackburn, in his opinion delivered to the House, stated 'that it had always been held that a stipulation that the merchant is to insure the amount, is almost conclusive to show that it is not a loan on security of freight to be earned, but an advance of freight.' There can be no doubt, therefore, that the sum paid by the charterer was a prepayment of freight."

In *The Karnak* (4) advances, not stipulated for in the charter-party, were obtained by the captain from the charterer. The receipt, given by the former, promised

(1) 26 L.J. Q.B. 205.
(2) 1 A.C., p. 222.
(3) 1876, 1 A.C., p. 234.
(4) 21 L.T. 159.

to pay the said advances "out of the proceeds of the present freight, with the addition of 10 per cent. per annum and charges for insurance." It was held by the Privy Council (reversing the judgment of the Court below) that the sums obtained were advances of freight to be repaid by deductions from freight, if earned; and if not earned, then to be lost by the charterer, unless he should have used the stipulated premium in insuring. Their lordships accordingly held that, although the merchants were under no obligation to make the advances, they were entitled to deduct the amount from the freight even as against the holder of a bottomry bond.

Dr Lushington in *The John* (1) said: "With regard to the advancement of freight, it is, I apprehend, clear beyond all doubt, that wherever freight has been *bonâ fide* advanced anterior to the period when a bottomry bond is given, the bond does not attach upon the freight so advanced; it might indeed savour of fraud, if the master should keep back from the knowledge of the party about to advance his money on bottomry of the ship, that the freight had been so advanced; yet even such concealment on the part of the master would not, I conceive, affect a question of this description, when brought before this Court. In order to simplify the matter, I will take for example the case of a vessel sailing from the port of Liverpool to Valparaiso, or any other foreign port, and that the owner of such vessel, being in want of money, consents to charter his vessel, with an agreement that he shall receive, paid down in advance, a fixed sum which may be less than he would be entitled to receive if he waited until the voyage was completed and the freight was earned. In such a case it would not, I apprehend, be questioned for a single moment that the receipt of the money in advance by the owner was not, in point of fact, a payment of the freight to all intents and purposes; and that the freight so prepaid and received could not be made the subject of any subsequent bottomry transaction."

(1) 1849, 3 W. Rob. 176.

In *The Red Sea* (1) the plaintiffs were insurers of the hull and machinery of the defendants' steamship whilst on a voyage from Pensacola to West Hartlepool. The vessel stranded at the entrance to the latter harbour and was abandoned by the defendants to the plaintiffs as a constructive total loss, but the cargo of timber was subsequently delivered. At Pensacola the sum of £1677, 19s. 10d. had been advanced to the master by the charterers, under a clause in the charter-party by which "sufficient cash for ship's ordinary disbursements at port of loading to be advanced the master by the charterers, or their agents at the (agreed) exchange, ship paying 2½ per cent. commission, including insurance. Master to give his draft, on owners or consignees, as required and customary to cover same, which shall be paid out of the first freight collected." The defendants accepted from the consignees of the cargo, who held the master's draft for value, the freight, less the above sum; but the plaintiffs claimed the gross freight as a benefit incident to the ship. It was held by Court of Appeal that the defendants, in accounting to the plaintiffs for the freight, were entitled to deduct the sum of £1677, 19s. 10d. as, by the terms of the charter-party, the cash advanced at Pensacola was equivalent to pre-paid freight, and, as such, did not pass to the plaintiffs on the abandonment of the vessel and subsequent delivery of the cargo.

Charterer insures advance freight but not advances of cash.

The difference between an advance, and a payment of freight in advance, affects the manner of insuring. The charterer is the proper person to insure advances of freight, since he is at risk in respect of them. Not so advances of cash irrespective of the freight; for these must be repaid in any event, and are, therefore, not at risk. If, then, the charter-party shows that it is the intention of the parties that the merchant making the advances shall insure them, that is strong to show that the advances are to be on account of freight.

The question was raised, but not decided, in *Tamvaco* v. *Simpson* (2), upon a clause, "The freight to be paid

(1) 1896, P. 20. (2) 34 L.J. C.P. 268.

on unloading and right delivery of the cargo, less advances in cash at current rate of exchange; one-half of the freight to be advanced by freighter's acceptance at three months on signing the bills of lading; owner to insure the amount, and deposit with charterer the club policy, and to guarantee same." Pollock, C.B., held that acceptance for the half freight was to be a prepayment, and not a mere loan. Willes, J., inclined to the same view. But the other judges appear to have doubted.

F.O.B. = Free on Board

These letters in a contract of sale relating to goods which are to be sent by sea denote that the goods are sold at a price which includes the cost of delivery on board. Under such a contract the goods are at the buyer's risk directly they are shipped, and he pays the freight and insurance upon their carriage (1), which under a *c.f.i.* contract are included in the price. The property in the goods shipped under such a contract passes to the buyer upon shipment, whether the ship be a general or a chartered one (2); though until they are actually delivered into the possession of the buyer or his agents the seller can stop them *in transitu*. It has been held that by the usage of a particular trade, warrants for goods deliverable *f.o.b.* to a buyer or his assigns by indorsement pass the property in the goods to the buyer on his giving value for them, free from the seller's lien (3).

C.F.I.

These letters in a mercantile contract denote "cost, freight, and insurance," and mean that the price named in the contract includes the expense of the goods, their

(1) *Inglis* v. *Stock*, 1885, 10 A.C. 263.

(2) *Cowasjee* v. *Thompson* (1845), 5 Moo. P.C. 173; *Browne* v. *Hare* (1858), 3 H. and N. 485 and 4 *ibid.* 822; *Ex parte Roserear China Clay Company* (1879), 11 Ch.D. 560.

(3) *Merchant Banking Company of London* v. *Phœnix Bessemer Steel Company* (1877), 5 Ch.D. 205.

carriage, and their insurance during the transit to the purchaser (1).

Back Freight

When the ship is either ready to deliver cargo at the port of destination or is prevented by excepted perils from reaching such port, but the merchant does not take delivery or forward instructions within a reasonable time, the master, if he does not tranship in the interests of the shipowner (2), has the power to deal with the cargo in the owner's interest at the owner's expense. He may land or warehouse it; or, if this impracticable, may carry it in his ship or forward it in another ship to such place as may be most convenient for its owner, and can charge the owner with remuneration for and expenses of such carriage under the name of "back freight."

Lump Freight

Lump freight is a gross sum stipulated to be paid for the use of the entire ship; it will, therefore, be payable if the shipowner be ready to perform his contract, though no goods are shipped, or though part of the goods shipped are not delivered. If any goods are shipped, some must be delivered to entitle the shipowner to lump freight (3).

Dead Freight

Dead freight means not freight, but an unliquidated compensation for the loss of freight recoverable in the absence and place of freight. The shipowner therefore

(1) See *Ireland* v. *Livingston* (1871), L.R. 5 H.L. 406; *Wancke* v. *Wingren* (1889), 58 L.J. Q.B. 519; *Delaurier* v. *Wyllie* (1889), 17 Sess. Cas. (4 ser.), 167.

(2) *Cargo ex Argos* (1873), L.R. 5 P.C. 134, settling the doubt of Mansfield, C.J., in *Christy* v. *Row* (1808), 1 Taunt., p. 314.

(3) *S.S. Heathfield* v. *Rodenacher*, 1896, 2 Com. Cas. 55; *The Norway* (1865), 3 Moore P.C. N.S. 245; *Robinson* v. *Knights*, 1873, L.R. 8 C.P. 465; *Merchant Shipping Co.* v. *Armitage*, 1873, L.R. 8 C.P. 469; *Bell* v. *Puller*, 2 Taunt. 285; *Brown* v. *Tanner*, L.R. 3 Ch. 597; *Puller* v. *Staniforth*, 11 East. 232; *Staniforth* v. *Lyall*, 7 Bing. 169; *Beynon* v. *Kenneth*, 8 Ct. of Sess. Cas. (4 ser.), 594.

is entitled to be paid for a deficiency of cargo, not at the rate assigned per ton in the charter-party for actual cargo, but a reasonable sum, deductions being made for charges saved to the shipowner in consequence of the deficiency (1).

"The term 'dead freight' denotes an agreed sum to be paid in respect of space not filled according to charter, or damages provided for by a charter, in the event of a freighter not loading a full cargo" (2). It may be payable at an agreed rate, but more generally its amount has to be assessed, by ascertaining the loss actually sustained by the shipowner, after taking into account the further expenses he would have been put to if the whole cargo had been shipped.

The shipowner is entitled to the full freight in the charter or bill of lading :—

(1) When he delivers the goods in a merchantable condition (3) at the port of destination (4), or is ready to deliver them, but the consignee does not take delivery within a reasonable time (5).

(2) Where a lump sum as freight has been stipulated for, and he has delivered, or is ready to deliver, some part of such goods.

(3) Where the necessity for transhipment having arisen, he has transhipped, and so caused the goods to be delivered, even though at a less freight than that originally contracted for (6).

(4) Where he has been prevented from delivering the goods solely by the default of the freighter, as in refusing to accept delivery at the port of destination, or in requiring delivery of the goods at an intermediate

(1) *M'Lean* v. *Fleming*, L.R. 2 H.L. (Sc.) 128.

(2) Maude and P. 389, citing *Birley* v. *Gladstone*, 3 M. and S. 205; *Gray* v. *Carr*, 40 L.J. Q.B. 257, L.R. 2 Q.B. 522; *Lockhart* v. *Falk*, 44 L.J. Ex. 105.

(3) *Asfar* v. *Blundell*, 1896, 1 Q.B. 123.

(4) Delivery need not be to the consignee, if it is in a manner approved by him; see *Fenwick* v. *Boyd*, 1846, 15 M. and W. 632.

(5) *Duthie* v. *Hilton*, 1868, 4 C.P. 138, at p. 143; *Cargo ex Argos*, 1872, L.R. 5 P.C. 134; and per Lord Mansfield in *Luke* v. *Lyde*, 1759, 2 Burr. 883.

(6) *Shipton* v. *Thornton*, 1838, 1 P. and D. 216; *Matthews* v. *Gibbs* (1860), 30 L.J. Q.B. 55, turns on specific facts.

port (1), or in refusing to name a safe port to which the ship can proceed and enter (2).

Where the freighter of a ship covenanted that if she should not be fully laden he would not only pay for the goods on board, but also for so much in addition as the ship would have carried for which he had before stipulated to pay freight, according to different rates for three descriptions of goods, it was held that the shipowner had no lien upon the goods actually on board for the amount of the dead freight; in other words, for the compensation in damages which he was entitled to for the freighter's breach of contract in not putting a full loading on board, which damages were unliquidated; and there being no lien in such a case either by the usage of trade or the express contract of the parties (3).

By a charter-party it was agreed between a shipowner and a merchant that his ship should proceed to Sulina and there load as customary from the factors of the freighter a full and complete cargo of staves, etc., which the merchant bound himself to ship, and therewith proceed to London, and deliver the same on being paid freight at specified rates. The freight to be paid in cash on right delivery of cargo. Fifty running days to be allowed for loading, and ten days on demurrage, over and above the laying days at £8 per day. The owners to have an absolute lien on the cargo for all freight, dead freight, demurrage, and average; and the charterer's responsibilities to cease on shipment of the cargo, provided it be of sufficient value to cover the freight and charges on arrival at port of discharge. The ship proceeded to Sulina, and, after a delay of eighteen days beyond the ten demurrage days, loaded a short cargo. A printed bill of lading was then signed by the captain for 283,682 staves to be delivered "at the port of discharge, as per charter-party, under order

(1) *The Bahia*, 1864, B. and L. 292; *Cargo ex Galam*, 1863, B. and L. 167; *The Soblomsten*, 1866, L.R. 1 A. and E. 293; *Luke* v. *Lyde*, 1759, 2 Burr. p. 888.

(2) *The Teutonia*, 1872, L.R. 4 P.C. 171.

(3) *Phillips* v. *Rodie*, 1812, 15 East. 547. See also *Pearson* v. *Goschen*, 1864, 33 L.J. C.P. 265.

or . . . assigns, he or they paying freight and all other conditions (these words being inserted in writing) or demurrage (if any should be incurred) for the said goods as per charter-party." Upon the arrival of the ship in London the shipowner claimed from the consignees of the bill of lading a lien on the goods mentioned in the bill of lading for cargo short shipped (claimed as dead freight), for demurrage proper, in respect of the ship being detained ten days at the port of loading, and for damages in the nature of demurrage for a detention beyond the demurrage days. The consignees had no notice until the arrival of the ship in London of this claim, but they had received a copy of the charter-party with the bill of lading. It was held by the Exchequer Chamber that the shipowner had no lien for "dead freight," as the claim was not "dead freight" within the meaning of the charter-party and bill of lading (1).

Liability for, where loading prevented by want of water.

A ship was chartered to proceed to Bilbao, "or so near, etc.," and load a full cargo of ore "when, where, and as directed." She was directed to a place at which only part of a cargo could be loaded, consistently with crossing the harbour bar, and the master was not requested to wait outside for more cargo. Charterers were held liable for dead freight (2).

Freight payable here

Question for the jury.

In *Lidgett* v. *Perrin* (3) goods were put on board a ship consigned for Calcutta, at 39s. per ton, "payable in London." It was held that it was for the jury to say from the surrounding circumstances whether the contract was a contract for "freight" contingent on the ship's arrival at her destination, or for a sum payable on the receipt of the goods on board her.

(1) *Gray* v. *Carr*, 40 L.J. Q.B. 257; *Lockhart* v. *Falk*, 44 L.J. Ex. 105.

(2) *Carbon Slate Company* v. *Ennis*, 114 Fed. Rep. 260. But see *Tweedie Trading Company* v. *New York Dyewood Company*, 127 Fed. Rep. 278, referred to in Stephens on Demurrage, p. 28.

(3) 1861, 11 C.B. N.S. 362.

He or they paying Freight

It is now well settled that the usual clause in bills of lading, engaging the master to deliver the goods to the consignees or assignees, "he or they paying freight," is introduced for the benefit of the master only, and does not cast upon him the duty of obtaining at his peril the freight from the consignees at the time of the delivery. Other words similar to the words "he or they paying freight" have received the same construction (1). The consignor still remains liable for the freight on his express contract in the charter-party, or on his implied undertaking arising from the shipment, although the goods have been delivered to the consignee without obtaining the freight, unless there has been what amounts in substance to payment by the consignee.

Where cash has been offered, but the master has elected to take from the consignee a bill of exchange, which is afterwards dishonoured, the remedy against the consignor is lost (2). The mere taking of a bill of exchange from the consignee, however, does not affect the remedy against the consignor, unless there has been an option to take either a bill or cash, and the master has for his convenience preferred the former (3).

On Payment of Freight

The meaning of the words, "on payment of freight," in bills of lading and charter-parties, is not that freight is to be paid either immediately before or immediately after the delivery of the cargo, but that the two acts are to be concurrent, and the master may demand payment of the freight each day on the cargo delivered (4).

(1) *Weguelin* v. *Cellier*, L.R. 6 H.L. 286.

(2) *Tapley* v. *Martens*, 8 L.R. 451; *Christy* v. *Row*, 1 Taunt. 300; *Shepard* v. *De Bernales*, 13 East. 565; *Dommett* v. *Beckford*, 5 B. and Ad. 521; *Tobin* v. *Crawford*, 5 M. and W. 235, 9 M. and W. 716.

(3) *Marsh* v. *Pedder*, 4 Camp. 257. See also *Anderson* v. *Hillies*, 12 C.B. 499; and as to set-off against freight, see *De Pothonier* v. *De Mattos*, E.B. and E. 461; *Wilson* v. *Gabriel*, 4 B. and S. 243.

(4) *Black* v. *Rose*, 2 Moore P.C. N.S. 277; *Paynter* v. *James*, L.R. 2 C.P. 348.

Freight payable monthly in Advance

If freight is payable "monthly in advance" the charterer is bound to pay the full monthly payment at the beginning of each month, an obligation which applies even to a time when it is probable that the hire will not continue for a whole month (1).

A demand of payment is not essential to entitle the shipowner to withdraw the ship from the time-charter for default of "punctual" payment (2).

Month

In the payment of freight, as in other mercantile contracts, a month means a "calendar month" unless the contract indicates the contrary (3).

Calendar.

A "calendar month" is computed by proceeding from the given day in one month to the day with the corresponding number in the next month. For example, noon of April 30 to noon of May 30 is a calendar month. As, however, a part of a day is in law reckoned as a whole day, where no intention to the contrary is expressed (4), a charter for a month which began at any time on April 30 would expire at the close of May 29. If the succeeding month, being shorter, has no day with a number corresponding to that of the day of commencement, the calendar month expires at the close of the last day of that month (5).

Where succeeding month is shorter.

In *Turner* v. *Barlow* (6), Erle, C.J., held that a "month" = a lunar month, except in mercantile transactions in the City of London.

(1) *Tonnelier* v. *Smith*, 1897, 2 Com. Cas. 258.
(2) *Tyrer* v. *Hessler*, 1902, 7 Com. Cas. 166.
(3) *Jolly* v. *Young*, 1 Esp. 186; *Hart* v. *Middleton*, 2 C. and K. 9.
(4) *Glassington* v. *Rawlins*, 3 East. 407; *R.* v. *St Mary, Warwick*, 22 L.J. N.C. 109; *Angier* v. *Stewart*, 1 C. and E. 359.
(5) *Migotti* v. *Colvill*, 4 C.P.D. 233.
(6) 3 F. and F. 949.

Day

The word "day" usually means day according to the calendar, beginning and ending at midnight (1). But sometimes the context, or the circumstances of the contract, show that the meaning is a period of twenty-four hours, without reference to any particular hour of commencement. Thus the clause in a policy insuring a ship for a voyage, "and for thirty days in port after arrival," has been held to mean thirty successive periods of twenty-four hours each (2). Where a contract is made for a period "from" a particular date, the rule is to exclude the day of the date named. So that a policy "for twelve calendar months from November 24, 1887" was held to extend to and include November 24, 1888 (3). And where something is to be done "within" a specified period after some event, the day of the event happening is excluded (4).

Freight payable on "Sailing" or "Final Sailing"

Advanced freight is frequently made payable on, or a certain time after, final sailing from the port of loading. The term "final sailing of the vessel from the port of loading," stated in a charter-party as the period for payment of the freight or part of it, means the final departure from the port and being at sea ready to proceed on her voyage, and not merely having the clearances on board and being ready to sail. In determining the point at which a vessel has "finally sailed," the circumstances of the particular port of loading must be considered, and where the vessel was wrecked after having her clearances on board, and had

Where ship subject to regulations under a local Act.

(1) *The Katy*, 1895, P. 56.

(2) *Cornfoot* v. *Royal Exchange Assurance Corporation* (1903), 2 K.B. 363; (1904) 1 K.B. 40. See Stephens on Demurrage, pp. 11–14.

(3) *South Staffordshire Tramways Company* v. *The Sickness, etc., Association* (1891), 1 Q.B. 402; and see *Sickness, etc., Association* v. *General Accident Assurance Corporation*, 19 Sess. Cas. (4th) 977.

(4) *Hardy* v. *Ryle*, 9 B. and C. 603; *Radcliffe* v. *Bartholomew* (1892), 1 Q.B. 161; Carver on Carriage by Sea, sect. 571A.

left the dock gates, and had reached a ship canal between high and low water, where she was subject to certain regulations under a local Act, and where she was liable to be stopped by the harbour master, it was held that she had not finally sailed within the meaning of the charter-party. Baron Parker said (1): "According to several cases on the insurance law, the sailing is determined to be that period of time when the vessel breaks ground, being at that time fully fit for sea, having the cargo on board which she intends to carry, with a competent crew, and having permission to leave by having the custom-house clearances on board. . . . But we all think, upon reading this charter-party, that something more is meant than the sailing of the vessel, because they use the term 'the final sailing of the vessel,' and we are not at liberty to reject that term; and we must consider that it is adopted with reference to the particular port of Cardiff where the vessel is to take on board her cargo, and that it means something more than merely having the clearances on board and being ready, and that it means her final departure from that port, and being out of the limits of that artificial port, and being at sea ready to proceed upon her voyage." A ship was chartered for a voyage from the Clyde to Demerara. The charter-party stipulated that the freight should be paid in cash one month after the sailing of the vessel, though the voyage was one which generally required six weeks. The vessel was wrecked three days after sailing. It was held that the shipowner was entitled to payment of the stipulated freight, though the voyage was not completed, and the ship was a total wreck (2).

When vessel breaks ground.

In *Thompson* v. *Gillespie* (3), by a charter-party entered into between the plaintiff and defendant, it was agreed, on the part of the plaintiff, that the ship was tight, staunch, and strong, and in every way fitted for the voyage, and that one-fourth of the freight should be

Meaning of "sailed."

(1) *Roelandts* v. *Harrison*, 23 L.J. Ex. at p. 173.

(2) *Leitch* v. *Wilson* (1868), 7 Ct. of Sess., 3 ser., 150.

(3) 1855, 3 W.R. 505. See also *Hudson* v. *Bilton*, 26 L.J. Q.B. 27; *Sharp* v. *Gibbs*, 1 H. and N. 801.

paid by the defendant, the freighter, on the ship having sailed, less 5 per cent. for commission and insurance, it was held, that having sailed in an unseaworthy condition, so that the policy could never have attached, she did not sail within the meaning of the charter-party, and therefore that the defendant was not liable to pay the one-fourth of the freight which was to have been paid in advance on the ship having sailed. The ship left the docks at Sunderland with the object of saving a spring tide, in the condition described by Lord Campbell in the following terms (1): "When the loss happened the ship had left the harbour of Sunderland, but she had not commenced her voyage to Constantinople. Her crew was not complete; the master and mate had not come on board; her shrouds and her cables had not been put in proper condition for the voyage; and, although the cargo was on board, the master had not signed the bills of lading. The ship left the harbour with the intention that she should be anchored in the roadstead, and lie there till the crew should be completed. . . . But although she had left the harbour without the intention of returning thither, she had left the harbour with the intention of not commencing the voyage till the necessary preparations should be completed. There is no pretence for the suggestion that she had commenced the voyage and was driven back, or stopped by the occurrence of something unforeseen. The intention when she crossed the bar unquestionably was that, being still unfit to proceed to sea, she should remain at anchor till the preparations for the voyage were completed, and before they were complete she was totally lost."

In *Sea Insurance Company* v. *Blogg* (2), the ship, fully equipped and loaded for the voyage, with her crew on board, moved from her loading berth and moored a short distance off in the river (at Newport News) on the evening of February 29. The object was to prevent the crew from going ashore, so that the ship could proceed to sea early next

(1) 24 L.J. Q.B. 344. (2) 1898, 2 Q.B. 398.

morning. It was held that the ship had not sailed on February 29.

By the terms of a charter-party the owners were entitled to an advance of one-third of the freight within eight days "from final sailing of the vessel from her last port in the United Kingdom." The vessel was loaded at Penarth Dock, and was towed by a steam-tug seven or eight miles, bringing her out about three miles into the Bristol Channel. She there cast anchor, as the weather was threatening. While she was lying at anchor a storm broke her cables and she ultimately ran ashore on Penarth beach, and the cargo was spoiled. The vessel had never been beyond the limits of the port of Cardiff as defined for fiscal purposes, but she had left what, for commercial purposes, is considered the port, and had been out at sea. She went ashore within the limits of the port in its commercial sense. The owners sued for one-third of the freight, and it was held by the Court of Appeal that the word "port" must be taken in its ordinary commercial sense, and that, as the vessel had got out to sea without any intention of returning, she must be taken to have finally sailed from her last port, that her being driven back into it by the weather made no difference, and that one-third of the freight was payable (1). Lord Justice Lindley said: "Final sailing, I apprehend, means getting clear of the port for the purpose of proceeding on the voyage."

Port, meaning of.

Final sailing.

In the case of *Sailing-ship Garston Company* v. *Hickie* (2), the meaning of the word "port" was discussed by the Court of Appeal. In this case the vessel had loaded at Cardiff, had left the docks with the intention of proceeding at once to sea, and had got beyond the artificial channels mentioned in *Roelandts* v. *Harrison* (3). Lord Esher, M.R., said (4): "By the word 'port' the parties intend the port as commonly understood by all persons who are using it as a port,

(1) *Price* v. *Livingstone*, 1882, 9 Q.B.D. 679.

(2) 1885, 15 Q.B.D. 580. See also *Goodbody* v. *Balfour*, 4 Com. Cas. 119; 5 Com. Cas. 59.

(3) 23 L.J. Ex. 169. *Cf. Lang* v. *Anderson*, 3 B. and C. 495.

(4) 15 Q.B.D., at p. 588.

Port, meaning of.

i.e. for sailing to or from it with goods and merchandise. What persons are they? Shippers of goods, charterers of vessels, and shipowners." His lordship then said the port was not generally "the legal port" as defined by Acts of Parliament, but "a place of safety for the ship and the goods whilst the goods are being loaded and unloaded"; that there never would be a port, in the ordinary business sense of the word, unless there was some element of safety in it for the ship and goods, and that nothing was more certain to be such a port than a natural port. That a natural port was "a place in which the conformation of the land with regard to the sea is such that, if you get your ship within certain limits, she is in a place of safety for loading and unloading." That any particular spot at which loading and unloading took place might be safely inferred to be within "the port" as understood by the parties, as, although the place of loading and unloading of goods was not always the exact measure of a port, it was a safe rule to say that the loading and unloading took place within the port. His lordship continued: "Then if you want to find out how far the port extends beyond the place of loading and unloading, what is the next test you would apply? If you find that the authorities, who are known in commercial business language as 'the port authorities,' are exercising authority over ships within a certain space of water, and that the shipowners and shippers who have ships within that space of water are submitting to the jurisdiction which is claimed by those authorities, whether legally or not, whether according to Act of Parliament or not, if you find what are called 'the port authorities' exercising port discipline, and the ships which frequent that water submitting to the port discipline so exercised, that seems to me the strongest possible evidence that the shipowners, the shippers, and the port authorities (that is, the persons connected with the locality), have all come to the conclusion to accept that space of water in which that authority is so exercised and submitted to as 'the port' of the place." His lordship declined to

say how much further the port of Cardiff extended, and whether or not it included Penarth Roads.

In the case of *The General Steam Navigation Company* v. *British and Colonial Steam Navigation Company* (1) the Court had to decide the extent of the port of London for pilotage purposes. For this purpose Baron Martin considered the meaning of "port" generally, and in the Exchequer Chamber Mr Justice Byles, who delivered the judgment of that Court, said (2): "The passage from Lord Hale, *De Portibus Maris*, shows that the limits of a port may depend on the existence of wharves, quays, houses, buildings, and other conveniences. It may accordingly, from time to time, vary and increase with the increase of population and of buildings. Lord Hale further says: 'The port of London anciently extended to Greenwich in the time of Edward I., and Gravesend is a member of it.' The extent of a port, therefore, after the lapse of years, may become a question of fact." Port of London.

Freight payable on signing Bill of Lading

In *Mashiter* v. *Buller* (3) goods were shipped under bills of lading, by which they were to be delivered at Lisbon. Some of the bills of lading said, "freight for the said goods being paid in London"; others, "the shippers paying freight for the said goods in London." Lord Ellenborough held that these words only meant that the freight should be paid in London instead of at Lisbon, and did not dispense with performance of the voyage; and he said that, if the freight had been paid on shipment, it might have been recovered back, the ship having been lost on the voyage (4).

In *Duthie* v. *Hilton* (5), by a bill of lading of cement shipped for Sydney, freight was to be paid within three days after arrival of ship, and before the delivery of any portion of the goods specified in the bill of lading.

(1) 1869, L.R. 3 Ex. 330, 345. (2) L.R. 4 Ex. 238, 245.
(3) 1 Camp. 84. (4) *Krall* v. *Burnett*, 1877, 25 T.L.R. 305.
(5) 188, 19 L.T. 285.

On the day of arrival at Sydney the ship caught fire and had to be scuttled. When the ship was raised, it was found that the cement was utterly destroyed by the sea water. It was held, in an action for freight by the shipowners against the shippers and consignees of this cement, that the freight upon this special contract was due only in the case of the plaintiffs being ready and willing to deliver the cement in specie during the three days after arrival of the ship. Lord Esher said: "Ordinarily the shipowner must not only be ready to deliver, but must actually deliver the cargo before he can demand freight. Although here the delivery was not necessary before the freight was due, yet the owner must still have been ready to deliver. If the freighters or consignees tendered the freight in three days, they were entitled to delivery. After the expiration of three days the ordinary state of things was altered, and the owners might sue for freight without averring readiness or willingness on their part to deliver."

In *Andrews* v. *Moorhouse* (1) the words in the bill of lading were "freight for the said goods being paid," and evidence was given that the broker who freighted the ship told the shipper that freight, on the voyage from London to the Cape, was £5 per ton, paid in London, or £7 paid at the Cape, and that the shipper preferred the contract at £5. The vessel was lost on the voyage and an action was brought for the freight. Gibbs, C.J., left it to the jury to say whether the contract was to pay it in any event, or only if the ship arrived at the Cape and delivered the goods. The jury found for the plaintiffs, and this was only upheld by the Court. His lordship said: "Here is an indication not only of the place where the money was to be paid, but also of the time when it was to become due, which was not the case in *Mashite* v. *Buller* (2), and added: "It signifies not what name is given to the money. The defendant is misled by the ambiguity of the phrase *freight*" (3).

A contract for the shipment of cattle guaranteed the

(1) 5 Taunt. 435. (2) 1807, 1 Camp. 84.
(3) See also *Lidgett* v. *Perrin*, 11 C.B. N.S. 362.

payment of freight by the shippers, whether or not the cattle were "lost in any manner whatsoever," and also provided that the freight should be payable on the arrival of the ship at Liverpool. It was held, by the American Courts, that the latter provision did not relieve the shippers from liability on their absolute guaranty, though the cattle were lost through fire and subsequent wreck of the vessel, which failed to reach its port of destination. It was further held that such liability was not affected by any question as to whether the bill of lading providing, "Freight payable, ship lost or not lost," was or was not in harmony with the shipping contract (1).

Intake Measure of Quantity delivered

It sometimes happens that the quantity of cargo delivered differs from the quantity that was actually shipped, or appears by the bills of lading to have been shipped. In *Spaight* v. *Farnworth* (2) a cargo of deals and battens consigned to the defendants was shipped on board the plaintiff's vessel under a charter-party by which freight was to be paid on deals, battens, etc., at the rate of £3, 5s. per St Petersburg standard hundred of 1980 superficial feet, and on deal ends at the rate of £2, 1s. 1d. per the like hundred eight feet and under. "Freight payable on deals and sawn lumber on the intake measure of quantity delivered." A bill of lading was signed for a specified number of pieces, deals, battens, and scantling, making freight payable "as per charter-party." The various pieces were, in the ordinary course of business, measured by the shipper at the port of shipment, and their dimensions entered in a specification ; the figures representing such dimensions being, before shipment, chalked on each piece respectively. During the voyage a number of the pieces were lost. The remainder was delivered at the port of destination, but

Quantity delivered differing from quantity shipped.

(1) *The Queensmore*, 1893, 53 Fed. Rep. 1022. See also *Ex. parte Nyholm, Re Child*, 43 L.J. Bank. 21.

(2) 1880, 5 Q.B.D. 115.

the measurement figures put on some of the pieces delivered had become obliterated. The dimensions of the pieces lost were unknown; but there was some evidence that they were of average size compared with the rest of the cargo. It was held by Bowen, J., that under the charter-party freight was payable on the measurement figures as ascertained at the port of shipment, and not on the quantity delivered measured at the port of discharge, according to the intake mode of measurement; and that, having regard to the particular circumstances, the amount might be calculated by assuming that the pieces lost were of average size as compared with the remainder, and making a proportionate reduction from the sum total of the measurements in the specification. His lordship summed up the earlier cases as follows: "As a general principle, freight, in the absence of special agreement to the contrary, becomes payable only on so much cargo as has been both shipped, carried, and delivered. If less has been shipped than has been delivered, as in the case of cargoes which treat under sea-water damage, freight is payable on the lesser quantity shipped. If less has been shipped and carried than has been delivered, as for instance in the case of goods which are compressed during the voyage and expand on being unloaded, freight is payable on the compressed and not on the expanded measurements. If, on the other hand, less has been delivered than shipped, as in the case of goods lost on the way, then freight would be payable only on the quantity delivered. For the convenience of business, contracts are frequently made to vary this *prima-facie* rule. Inconvenience in practice must obviously often arise unless some one measurement of the quantity delivered is agreed upon for the purpose of the calculation of freight. Timber, of course, is a cargo that is not liable to change its dimensions between its time of shipment and its time of delivery; but the mode of measuring timber differs in various ports, and probably there is a considerable difference in the accuracy of the modes, and the measurement of large cargoes of timber,

General principle of payment of freight.

moreover, is probably conducted with more expedition than exactness. There is nothing accordingly unnatural that the ship and the charterer should agree that freight is to be paid on the measurement figures arrived at at the port of loading. The shipper who is interested as between himself and his consignee, in not understating the timber in his specification, is a person whose measurements the ship can afford to trust. This is what seems to me to have been done in the present instance. The plain meaning of the words in the charter-party is that freight is to be paid on the intake; that is to say, the shipment measure is dimensions of the actual quantity delivered. The measure, that is to say, which the surveyors put upon the timber when it is measured for the purposes of the specification before shipment alongside the ship. I see no reason for attributing to the words 'intake measure' the less obvious meaning 'intake method of measurement.'"

Right to reduction of freight in respect of shortage.

A cargo of timber of different kinds, consigned to the defendants, was shipped on board the plaintiff's vessel under a charter-party of which one clause was, "Bills of lading to be conclusive evidence against the owners as establishing quantity delivered to ship." The bill of lading of the cargo gave the number of pieces of deals and battens and the number of superficial feet and the like particulars of scantlings, deal ends, and boards respectively. The bill of lading also gave the total number of pieces and of superficial feet. There was a short delivery of deals, but an over delivery, which was taken over by the consignees, of scantlings and boards, the total number of pieces of timber delivered being slightly in excess of the total number given in the bill of lading. In an action by the shipowners to recover freight, in which the consignees counter-claimed for the value of the deals not delivered, the Court of Appeal held that the bill of lading was conclusive as to the number of pieces and the number of superficial feet in each class of timber, and that the consignees were entitled to a

deduction on freight in the proportion that the number of pieces of deal not delivered bore to the number specified in the bill of lading. It was held also, that the defendants were entitled on their counter-claim to recover the value of the deals not delivered, to be ascertained by taking the proportion that the number undelivered bore to the number specified in the bill of lading (1).

By a charter-party a cargo of sugar in bags was to be loaded at a named port, and the ship so loaded was to proceed to another named port and there deliver the cargo "agreeably to bills of lading on being paid freight in full of all port charges at the rate of 10s. 6d. per ton of 20 cwt. gross weight shipped, payable on right and true delivery of the cargo." Charterers' liability was to cease "when cargo is shipped and bills of lading signed, provided all the conditions called for in this charter have been fulfilled, but vessel to have a lien on the cargo for freight, dead freight, and demurrage." Any difference between the charter-party and bills of lading freight was to be settled at the port of loading on clearance of the vessel, if required by the master. The amount due under this clause was ascertained at the port of loading, and paid by the charterers to the shipowners. The vessel loaded a full cargo, but on the voyage she grounded and a portion of the cargo was lost. The remainder was delivered at the port of discharge, and the bills of lading freight on the whole cargo shipped was collected by the shipowners. In an action by the charterers to recover, as money received to their use, the difference between the freight so collected by the shipowners and the amount due to them under the charter-party in respect of the cargo delivered, it was held by the Court of Appeal, affirming the judgment of Walton, J., that this was a contract not for a lump-sum freight, but for payment of freight in the ordinary way—namely, on the cargo actually delivered, and therefore that no freight was

(1) *Mediterranean S.S. Company* v. *Mackay* (1903), 1 K.B. 297; *Spaight* v. *Farnworth* (1880), 5 Q.B.D. 115, approved.

payable in respect of a portion of the cargo which was lost on the voyage (1).

A bill of lading was signed in respect of 284,690 pieces of pit props, measuring 55,782·32 cubic feet, to be delivered in right number of pieces, on payment of freight at 9s. 6d. "for every load of 50 English cubic feet, and all other conditions as per charter-party." The bill of lading contained the following clause: "Responsible for number of pieces, but not for quality and measure." By the charter-party it was provided that the cargo was to be delivered at the rate of 9s. 6d. "for every intaken load of 50 English cubic feet," and that bills of lading were to be conclusive evidence against the owners as to the quantity of cargo shipped. At the port of discharge an excess number of pieces beyond that specified in the bill of lading was delivered. It was held, in a question between the consignees of the cargo and the shipowners, that the conditions in the charter-party as to freight being payable at 9s. 6d. on every intaken load was incorporated in the bill of lading, and therefore that freight was only payable on the number of pieces specified in the bill of lading (2).

Freight payable as per Charter-Party

The bill of lading often contains a reference to the charter-party by expressing that the goods are to be delivered on payment of the freight "and all other conditions as per charter-party." It has often been held that, if a bill of lading and a charter-party conflict with each other, the holder of the bill of lading, if he has taken the same in good faith and for value, is entitled to his goods on the terms contained in that instrument (3). Mr Justice Willes, who delivered the judgment of the Court in *Russell* v. *Niemann* (4), said

(1) *London Transport Company* v. *Trechmann*, 1904, 73 L.J. K.B. 253. See also *Fallaysen* v. *Welford*, 1 Cab. and E. 198.

(2) *Oostzee Stoomvaart Maats* v. *Bell*, 11 Com. Cas. 214; 22 T.L.R. 643.

(3) *Gardner* v. *Trechmann*, 15 Q.B.D. 154; *Fry* v. *Chartered Mercantile Bank, etc.*, 1 C.P. 689.

(4) 34 L.J. C.P. 10.

the conditions incorporated in the bill of lading by the above clause must be taken as limited by the context to conditions *ejusdem generis* with that for the payment of freight, namely, conditions to be performed by the person who receives the goods at the port of discharge. This decision has since been approved by the House of Lords in the unreported case of *Taylor* v. *Perrin* (1), where Lord Blackburn said: "I am clearly of opinion that, on the true construction of the bill of lading, the reference to the charter-party does not extend the exceptions by adding those that are in the charter-party. The case which has been referred to, *Russell* v. *Niemann*, in which Willes, J., gave judgment, as it appears to me perfectly correctly, decided that the reference to the charter-party is meant to bring in those conditions which would apply to the person who has taken the bill of lading, and is taking delivery of the cargo, such as the payment of demurrage, the payment of freight, the manner of paying, and so on, but is by no means to be taken to incorporate all the conditions of the charter-party" (2).

Where shipment made through the intervention of a charterer.

In *Schmidt* v. *Tiden* (3) the plaintiff, as master of a ship lying in London, entered into a charter-party with L., a ship-broker, to carry a quantity of iron at a tonnage freight. By the terms of the charter-party freight was to be paid in London on signing bills of lading, the owner to have an absolute lien for freight. On the same day L. re-chartered the ship to the defendants to carry the same quantity of iron at an increased freight, with similar provisions as to the payment of and lien for freight, and with the following clause: "The brokerage of 5 per cent. is due on the execution of this charter to L., by whom the vessel is to be cleared at the port of loading." L. had, however, no authority to act as broker for the plaintiff, or to receive the freight. Neither the plaintiff nor the

(1) See the judgment of Baron Hudleston in *Serraino* v. *Campbell*, 25 Q.B.D. 501, 503.

(2) *Cf. Serraino* v. *Campbell* [1891], 1 Q.B. 283; *Hamilton* v. *Mackie*, 5 T.L.R. 677.

(3) 1874, 43 L.J. Q.B. 199.

defendants knew of the charter-party entered into by the other. The iron was shipped by the defendants, and the master signed and the defendants received bills of lading, by which the iron (stated to be shipped by the defendants) was to be delivered to consignees or assigns, "paying freight for the said goods as per charter-party." The plaintiff did not claim the freight on signing the bills of lading, and delivered the cargo without insisting upon his lien. L. in the meantime obtained the freight due from the defendants, and, having stopped payment, the freight due under his charter was not paid to the plaintiff. It was held, that the plaintiff was not entitled to recover freight from the defendants as shippers of the iron, inasmuch as both parties made a mistake as to the charter-party referred to in the bills of lading, and were consequently never *ad idem*. No contract could therefore be implied on the part of the defendants to pay freight to the plaintiff.

A charter-party provided that the cargo was to be delivered upon payment of freight at a fixed rate per ton, and "one shilling per ton gratuity for the captain on good delivery of the cargo." One of the bills of lading for a portion of the cargo was to the effect that the goods shipped were to be delivered "assigns paying freight for said goods as per charter-party." It was held that the allusion to the charter-party imported it into the bill of lading, and that the consignees of the cargo who held the bill were liable to pay the captain's gratuity as well as the freight (1).

"*Merchandise*" *and* "*Produce*"

General expressions, such as "merchandise" or "produce," used to describe the intended cargo, denote things which have those characters in the particular trade, having regard especially to the particular port of loading. "Produce" has been said to mean "any-

(1) *Howitt* v. *Paul*, 5 Ct. of Sess. Cas., 4 ser., 321.

thing produced by the country in the neighbourhood of the port of loading, and being an ordinary subject of importation" (1). Under a time-charter of a steamer to be employed in such lawful trades between ports of the United States and the West Indies or Caribbean Sea, as the charterers might direct, the owners warranting her to be "tight, staunch, and strong, and every way fitted for the service," the owner cannot recover from the charterers for injury to the vessel from bringing a cargo of asphalt from Trinidad, which was loaded under direction of the master; for, while such cargo is peculiar and requires special fittings, and subjects the surrounding parts of the vessel to more than the usual lateral pressure when shipped in bulk, it is not only lawful merchandise, but constitutes one of the chief articles of export from the island, and was clearly within the terms of the charter, which placed the risk of the sufficiency of the vessel upon the owner (2). Charles, J., in *Vanderspar* v. *Duncan* (3), considered that the meaning of "merchandise" established by usage, confined it to "goods ordinarily shipped from the port of shipment."

Charterer's option where one or more of several articles.

Where there is a contract that the shipper shall supply a full cargo consisting of one or more of several articles, the shipper has the right to elect which of those articles he will supply. In *Southampton Steam Colliery Company* v. *Clarke* (4), by a charter-party, the defendant, the charterer, undertook to load at Archangel "a full and complete cargo of oats or other lawful merchandise," and the plaintiffs, the shipowners, to deliver the same on being paid freight as follows: "4s. 6d. sterling per 320 lbs. weight delivered for oats; and if any other cargo be shipped, in full and fair proportion thereto, according to the London Baltic printed rates." The defendant put on board at Archangel a full and complete cargo of flax, tow, and codilla, being three of the articles mentioned in the Baltic printed rates, and paid to the plaintiffs the freight earned by the

(1) Per Maule, J., in *Warren* v. *Peabody*, 19 L.J. C.P., p. 46.
(2) *Dene S.S. Company* v. *Munson*, 1900, 103 Fed. Rep. 983.
(3) 8 T.L.R. 30. (4) 1870, L.R. 6 Ex. 53.

goods thus shipped according to a scale derived from the tables which constitute the Baltic rates. The plaintiffs claimed in addition the difference between this amount and the larger amount which would have been earned by a full and complete cargo of oats. It was held that flax, tow, and codilla, being "lawful merchandise" within the meaning of the charter-party, the defendant had fulfilled his contract by loading a full and complete cargo of those articles, and, therefore, was not, on the true construction of the charter-party, liable for the additional freight claimed by the plaintiffs as upon a full cargo of oats. Lord Blackburn said (1): "The articles tendered for cargo were of so slight a specific gravity that the ship was obliged to ship an unusually large proportion of ballast, so that she carried only 168 tons of cargo to 120 tons of ballast, and the freight earned was in consequence not very much more than one-half of that which would have been carried if the cargo had consisted of oats. If, therefore, the shipper has a right under such a charter-party to supply any of the enumerated articles in such proportions as suits his own convenience, without any regard to the interest of the shipowner, the defendant has pushed his right to an extreme, and we should be glad to find that there was something to prevent his doing so. But we can find nothing to enable us to do so. . . . When a full cargo is supplied it is (in the absence of any stipulation expressed or implied to the contrary) the shipowner's duty to procure what ballast he may require for that cargo (2). It seems clear that if the only articles specified in the charter-party had been those which the shipper, having an alternative, chose to supply, the shipowner must have furnished the large proportion of ballast gratis. It might have been prudent for the shipowner to protect himself against an extreme use of this privilege, by stipulating that the freight should not be less than some fixed sum, if the freighter would have assented to such a stipulation; but we cannot assent to the argument that such a

(1) L.R. 6 Ex., p. 57. (2) *Towse* v. *Henderson*, 4 Ex. 890.

stipulation is expressed by the words 'in full and fair proportion.' It might also have been prudent to insert a stipulation that the shipowner should not be bound to supply more ballast than bore a reasonable proportion to the cargo shipped, say, for example, one ton of ballast to ten of cargo, and should be paid dead freight for the excess of ballast, and a custom to that effect would not be unreasonable. But there is no such stipulation, and the jury found that there is no such custom. The only remaining question is, whether any such qualification is implied by law. There is no authority for saying that such a qualification is implied by law. *Moorsom* v. *Page* (1) is a direct authority to the contrary."

In the Court of Exchequer, the opinion was expressed that the only kinds of "other merchandise" that might be shipped under that charter-party were those "specified in the London and Baltic tables as bearing certain proportions to oats" (2).

Full and complete cargo.

Where by a charter-party the freighter covenanted to provide for the ship a full and complete cargo consisting of copper, tallow, and hides, or other goods on which separate rates of freight were to be paid, it was held that, having supplied her with as large a quantity of tallow and hides as she chose to take on board, he was not bound to provide any copper, although for want of it the ship was obliged to keep in her ballast, and did not make so advantageous a freight as she otherwise would have done. Under a covenant in a charter-party to pay freight on skins by the pound, net weight at the King's beam, freight is due on the outside skins in which the packages are contained (3). In *Irving* v. *Clegg* (4) there was an agreement to proceed to the East Indies, and there load a full and complete cargo; the fore-cabin to be filled with light goods; freight £4, 15s. per ton of 20 cwt. for sugar, coffee, and rice, and for pepper at 18 cwt. to the ton; 100 tons of rice or sugar to be shipped previous to any other part of

(1) 4 Camp. 103.
(2) L.R. 4 Ex., p. 78.
(3) *Moorsom* v. *Page*, 1814, 4 Camp. 103.
(4) 1 Bing. N.C. 53.

the loading, to ballast the vessel. It was held that the shipowner was obliged to furnish what further ballast was necessary, and that the freighter, after shipping the 100 tons of rice or sugar, was at liberty to complete the cargo with light goods.

By a charter-party the defendants undertook to ship a full cargo of produce at N. or B. It was stipulated that the freight should be paid "at and after the rate of 5s. 6d. per barrel of flour, meal, and naval stores, and 11s. per quarter of 480 lbs. of Indian corn or other grain." It was proved that a quarter of wheat weighing 480 lbs. occupied 10 cubic feet; and that oats weighed 272 lbs. and occupied 16 cubic feet. The vessel came home with a short cargo. In an action on the charter-party for freight in respect of the unoccupied space, the defendant paid into Court the amount that would have been payable if that space had been filled with oats, and the freight payable in respect of them was 11s. per quarter. It was held that the words "other grain" must be taken to mean such grain as would weigh about 480 lbs. per quarter, and could not therefore include oats; and that oats, like other produce not enumerated, should be paid for, not at 11s. per quarter, but after the rate of 5s. 6d. per barrel of flour and of 11s. per quarter of grain weighing 480 lbs. (1).

By a charter-party the charterer agreed to load the ship with a full and complete cargo of sugar or other lawful produce, and to pay freight at certain rates for certain specified goods, including sugar and timber; "other goods, if any be shipped, to pay in proportion to the foregoing rates, except what may be shipped for broken stowage, which shall pay as customary." The charterer supplied the ship with as full a cargo of timber as she could carry, but leaving space for broken stowage to fill the interstices between the logs of timber. It was held, that he was bound to provide the ship with the broken stowage necessary to

(1) *Warren* v. *Peabody*, 1849, 19 L.J. C.P. 43. See *Lewis* v. *Marshall*, 1844, 7 M. and G. 729.

complete a full cargo (1). Willes, J., said, on p. 185: "I wish to point out that the case of *Moorsom* v. *Page*, when looked at, does not conflict with our decision. In that case the vessel was filled with tallow and hides together, with only so much ballast as was necessary for a full cargo of tallow and hides, and the contention on the part of the shipowner was, that the freighter ought to have filled up the place of such ballast with copper, on which freight would have been due; but Lord Ellenborough ruled that, as the freighter had the right by the charter-party to ship a full cargo of tallow and hides, and as he had put on board as full a cargo of tallow and hides as she could take, the fact that if he had loaded the ship in some other way the owner would have earned more freight, did not make it compulsory on him to do so. Here the ballast plus the timber did not fill the ship, but left a space which ought to have been filled with broken stowage."

In *Stanton* v. *Richardson* (2) the ship was to sail to a port of loading, and there load a "full and complete cargo of sugar in bags, hemp in compressed bales, and/or measurement goods," and different rates of freight were specified for wet and for dry sugar. The ordinary statement of the condition of the ship did not appear in the charter-party, but it contained a clause that, "the master engages that the vessel, before and when receiving cargo, shall be a good risk for insurance; and during the voyage the master shall take all proper means to keep the vessel tight, staunch, and strong, well manned and provided, and in every way fitted and provided for the voyage." A cargo of "wet" sugar was provided by the charterer at the port of loading. A great deal of moisture drains from wet sugar, and, owing to the nature of the material, the ship's pumps were unable to clear the ship of the drainage. The ship was perfectly seaworthy except for this particular cargo, and the pumps were sufficient for ordinary purposes, but she would not have been seaworthy for the voyage in her then condition. The sugar had to

(1) *Cole* v. *Meek*, 1864, 33 L.J. C.P. 183. (2) 7 C.P. 421; 9 C.P. 390.

be unloaded, and the charterer refused to reload it, or to provide another cargo. Cross-actions were brought by the owner against the charterer for not providing a cargo, and by the charterer against the owner to recover damages by reason of the ship not being fit to carry the cargo provided. The jury found that the cargo offered was a reasonable cargo, and that the ship was not reasonably fit to carry a reasonable cargo of wet sugar. It was held by the House of Lords that the shipowner undertook by the charter-party that the ship should be reasonably fit for the carriage of a reasonable cargo of any of the goods specified in the charter-party, including wet sugar, and that the charterer was entitled to a verdict. It was held also that the charterer was entitled to refuse to load any further cargo, and to claim damages from the shipowner for not providing a fit ship. He was not bound to load the ship while its unfitness continued, and as that could not be remedied in time consistent with the object of the voyage, he was altogether absolved.

Lord Cairns, L.C., in the course of his judgment (1) said: "Now the cargo which, on the one hand, the charterers had the right to have carried, and which, on the other hand, they were bound to provide, is thus described: 'A full and complete cargo of sugar in bags, hemp in compressed bales, and/or measurement goods.' These words 'and' and 'or' are not without some significance, because they appear rather to show that this specification of different kinds of cargo was to be read either disjunctively or conjunctively; it might be all of one kind, or it might be a mixture of the two kinds mentioned, 'not exceeding what the vessel can reasonably stow and carry over and above her tackles' (2). And then it (the charter-party) provides for the passage which is to be performed; and then, in consideration of that, the freighters agree that the freight on the said cargo shall be paid 'at the following

(1) 1875, 3 Asp. M.C. 24.

(2) See also per Baron Alderson in *Cuthbert* v. *Cumming*, 1855, 24 L.J. Ex. 198, 310.

rates, if loaded at Manilla for the United Kingdom, £4, 2s. 6d. sterling for dry sugar; £4, 5s. for wet sugar; £4, 15s. for hemp and measurement goods.' Having regard to the specification of two prices for the two kinds of sugar mentioned, we are entitled, in construing the contract, to go back to the sentence where sugar was first mentioned, and to read the word there as if it were 'wet or dry' sugar; then the contract becomes a contract to carry 'a full and complete cargo of wet or dry sugar in bags, hemp in compressed bales, and measurement goods, not exceeding what the vessel can reasonably stow.' Now, as regards the cargo which might be tendered, and which the shipowner was bound to carry, I feel no difficulty in advising your lordships, as a matter of ordinary construction, about which, unless there is something to be found in other parts of the document qualifying the ordinary meaning of the words, there can be no doubt, that the meaning of this stipulation is, that it gives to the charterer the option in what form he will tender the cargo; he may tender it all of wet sugar, or of dry sugar, or of hemp, or of measurement goods, or he may admix the different items of cargo as he thinks fit, always provided that he does not present a cargo of any kind, or of all kinds together, which is unreasonable, as regards the nature of the goods which he presents. The only limit as regards quantity is that which is laid down, namely, what the vessel can reasonably stow. Provided he keeps within that limit, and presents goods which are of the ordinary kind at the place which is mentioned, he may take his choice in what form he will present the goods; that is to say, which of the various items mentioned he will choose as the cargo to be carried."

Lawful merchandise.

But where the merchant agrees to load a cargo of goods of a specified description or other "lawful merchandise," it has been held that, for the purpose of calculating the freight, this must be treated as merchandise *ejusdem generis* with that specified (1).

(1) *Capper* v. *Forster*, 1837, 3 Bing. N.C. 938; *Cockburn* v. *Alexander*, 1848, 18 L.J. C.P. 74.

By a charter-party made in London, the defendant contracted to load, in the plaintiff's ship, "a full and complete cargo of sugar, molasses, and/or other lawful produce." By the custom of Trinidad, the port of loading, a cargo was a full and complete cargo of sugar and molasses, if it was a full and complete cargo of sugar and molasses packed in puncheons and hogsheads, though room for other packages was left. The defendant loaded as many puncheons and hogsheads of sugar and molasses as the ship could hold, and some cocoa also, but still there was room for other cargo or for more sugar and molasses if packed in barrels or tierces, which are ordinary vessels for the packing of sugar and molasses, but which do not bring them home in so good condition as the larger casks. In an action against the defendant for not loading a full and complete cargo, according to the charter-party, it was held that the custom was reasonable; that evidence of it was relevant and admissible for the defendant, as it did not vary the contract, but only explained what was the meaning of the expression in the contract, "a full and complete cargo of sugar and molasses" (1). Baron Alderson, delivering the judgment of the Court of Exchequer, said (2): "The contract on the face of the charter-party was that the parties were to 'load a full and complete cargo of sugar, molasses, and/or other lawful produce,' so that, according to the contract, the parties were either to load a full and complete cargo of sugar and molasses and other lawful produce, or a full cargo of sugar and molasses, or a full cargo of other lawful produce, leaving it open in every way by reason of the words 'and' and 'or' being introduced into the charter-party" (3). [The learned judge then stated the facts.] "The question was, whether it was competent for the learned judge at the trial to admit evidence of the custom as to the port of Trinidad, the place where the ship was loaded, that it was a full and complete

Customs of the port.

(1) *Cuthbert* v. *Cumming*, 1855, 24 L.J. Ex. 198, 310.
(2) 24 L.J. Ex. 199.
(3) See per Earl Cairns in *Stanton* v. *Richardson*, *supra*.

cargo of sugar and molasses, if it was a full and complete cargo of sugar and molasses packed in hogsheads and puncheons. There could be no more hogsheads or puncheons put in; the ship would hold no more; but the ship was capable of holding other small packages between them. The custom was proved. . . . It cannot be received if it contradicts the charter-party itself. . . . You can give no evidence to contradict or alter its effect, but then it must be the effect clearly made out by the wording of the charter-party itself. You have a perfect right to explain the contract, and show what it really means according to the words used by the parties. You may therefore show that a full and complete cargo of sugar and molasses means in truth a full and complete cargo of sugar and molasses packed in the ordinary way in which sugar and molasses are packed to be carried." On the question whether the custom was unreasonable, his lordship said: "Then is it a legal custom? The case is, that sugar packed in hogsheads, and molasses packed in puncheons, come better and more conveniently and more usefully, and of better quality to the merchant in this country. It seems to us by no means to be an unreasonable thing that that should be the mode of loading the cargo, and that the parties should have agreed, by this custom, that that should be the established mode of doing these things. The custom is a reasonable custom, because it enables the sugar to be brought in the most advantageous mode for the merchant, and the other party is not without his remedy. He can stipulate for broken stowage, for the custom only applies to charter-parties in which there is no stipulation as to broken stowage. It does not apply if there be such a stipulation, because then it would be to contradict the charter-party itself" (1).

By a charter-party made between the plaintiff, the owner of a steamship, and the defendants, her affreighters, it was provided that the ship should proceed to a specified port and there load from the factor of the affreighters a "full and complete cargo of sugar in

Full and complete cargo.

(1) See also *Cole* v. *Meek*, 1864, 33 L.J. C.P. 183.

hogsheads and/or bags, or other lawful merchandise," and being loaded, should therewith proceed to another port and deliver the same at such place as the consignees might direct, on being paid freight at the rates therein mentioned. The cargo of sugar, with which the ship was loaded, was not, the plaintiff said, a "full and complete" one, inasmuch as the parts of the ship known as the "lazarette" and the "alleyways" were not filled with bags of sugar, as they ought to have been. The defence was that the master of the ship did not stow the cargo properly; that the defendants tendered more hogsheads of sugar (which were too large to go into the alleyways); and that, if the bags had been put there, there would have been space for more hogsheads in the hold. It was held by the Court of Appeal that the defendants were not bound to send the cargo in any particular form, and that, as they sent part of it in bags and hogsheads, and the master chose to assume that the remainder would be in bags, and to leave stowage which was only suitable for bags, and not for hogsheads, which the defendants had an equal right to send, they could not be made liable for dead freight (1). Lord Herschell said (2): "The master had no right to assume, without inquiry, that the cargo would come in the one form or the other. If, for his guidance in stowing it, he required information as to this, he should have inquired of the charterers. If they had misled him, he would have ground for complaint; but there was no misleading. . . . He chose to fill the hold with bags which would have gone in the alleyways, leaving the alleyways empty, and when the charterers tendered more hogsheads, he had no room for them." It is doubtful whether a charter-party in this form would compel the charterers to provide a cargo for the "lazarette," or would oblige the shipowner to receive it there.

In *Duckett* v. *Satterfield* (3) a merchant contracted by

(1) *Furness* v. *Tennant*, 1892, 66 L.T. 635. *Cf. Harris* v. *Best*, 68 L.T. 76, per Lord Esher, p. 78.

(2) 66 L.T., p. 637.

(3) 1868, 3 C.P. 227.

a charter-party to load a "full and complete cargo of sugar in cases, or other lawful merchandise, with sufficient bags for broken stowage," at a certain rate of freight per ton for sugar, "and for other produce a rate proportionate to sugar in casks, with sufficient bags for broken stowage, agreeably to the custom of the port of loading." By the custom of the loading port, a given quantity of cotton was to be taken as equal to a ton of sugar. The charterer filled the ship with cotton, putting on board a reasonable quantity of stone for ballast. It was held that the stipulation for "sufficient bags (of sugar) for broken stowage" was only applicable to a cargo of sugar in cases or casks, and consequently that the engagement to ship a full cargo of lawful merchandise was performed.

In *Isis Steamship Company* v. *Bahr* (1), by a charter-party made in contemplation of a mid-winter loading, the charterers agreed to load at a port in the United States "a full and complete cargo of wet wood pulp which contains about 50 per cent. of water." The charterers loaded pulp of that description which was frozen. Frozen pulp is not compressible, and occupies more space than when unfrozen ; consequently the cargo was less in quantity than it would have been in summer. The shipowners having brought an action against the charterers for the loss of freight thus caused, evidence was given that in winter wet pulp was usually loaded in a frozen condition. It was held by the House of Lords, affirming the Court of Appeal, that the obligation to load a full and complete cargo had been performed by loading as much pulp in a frozen condition as the ship would carry.

Goods to be prepared as customary.

As we have seen in *Cuthbert* v. *Cumming* (2), if there is a customary mode of preparing particular goods for shipment at the port of loading, the expression, "full and complete cargo," in relation to those goods, must be construed with reference to that practice.

Where a practice prevailed of compressing bales of cotton wool by machinery, to improve their stowage,

(1) 1900, A.C. 340. (2) 24 L.J. Ex. 198, 310.

the furnishing a cargo of cotton wool in compressed bales, as they came from the grower, was held not to be a compliance with a contract to load a full and complete cargo. Where the freighter had an option to load a whole ship with one species of goods at a higher rate of freight, or a part with goods at a higher rate, and a part with another species of goods at a lower rate, but the latter, if laden at all, required to be first laden on board, the freighter, by beginning to load with the goods at the higher rate, was deemed to elect to furnish an entire cargo of those goods at the higher rate, and he having so elected, but failing to load a complete cargo thereof, was held to be liable in damages for the entire complement at the higher rate, without regard to the liberty he once had to load goods at a lower rate (1). Option in loading.

In *Haynes* v. *Halliday* (2) the defendant agreed to convey on board his ship a boat for the plaintiff of certain dimensions. Plaintiff presented a decked boat, within the size agreed on. It was held, that evidence was properly received of a practice to take off the decks of such boats when they were stowed on board ships; and that the plaintiff, having declined to permit his deck to be removed, could not sue defendant for breach of agreement.

By the terms of a charter-party, "the ship P. was to proceed to Port Phillip, and there load a full and complete cargo of wool, tallow, bark, or other legal merchandise, the bark not to exceed 180 tons, the tallow and hides not to exceed 80 tons, and, being so loaded, to proceed therewith to London and deliver the same on being paid freight as follows: for wool pressed, twelve-eighths of a penny per pound; unpressed, thirteen-eighths of a penny per pound; tallow, £3 per ton; bark, £4 per ton; hides, £2 per ton; one-third to be paid in cash on unloading, the remainder by bills at two months." The ship took on board a few goods at Port Phillip, and obtained leave, without prejudice to the charter, to go to Sydney, where she was loaded full, and returned to London with 61 tons of wool only, and a

(1) *Benson* v. *Schneider*, 1817, 7 Taunt. 271. (2) 1831, 7 Bing. 587.

large quantity of dead weight. In an action for not loading at Port Phillip according to the tenor of the charter, it was held, that the terms of the charter-party meant that the shipowners should be paid freight for a full homeward cargo, consisting of 180 tons of bark, tallow, and hides, and the residue of wool; and that damages were to be calculated on that basis. It was held also that, under the words "other legal merchandise," the charterer was at liberty to ship any lawful articles he pleased (due regard being paid to the safety of the vessel), but was bound to pay the same amount of freight as the vessel would have earned if loaded within the terms of the charter. It was further held that there was no ambiguity in the terms of the charter-party, and parole evidence was inadmissible to show which party (by the custom of the port of loading) should pay for the cost of pressing the wool (1).

Other legal merchandise.

Cost of preparation.

Primage and Average accustomed

Certain small payments are usually associated with freight under the terms "primage and average accustomed," the amounts of which depend upon the usage of the particular trade and voyage. The right to payment of them seems to depend upon the same conditions as the right to freight does, apart from express stipulations. The word "primage" denotes a small payment to the master for his care and trouble, which he is to receive to his own use, unless he has otherwise agreed with his owners. This payment appears to be of very ancient date. In the *Guidon* it is called "*la contribution des chausses ou pot de vin du maitre.*" It is sometimes called the master's hat-money. The word "average" in this place denotes several petty charges which are to be borne partly by the ship and partly by the cargo—such as the expense of towing, beaconage, etc.

Primage.

Average.

In cases where primage is payable by the consignee of the cargo to the master of a ship, the master may maintain an action for it, though the freight has been

(1) *Cockburn* v. *Alexander*, 1848, 18 L.J. C.P. 74.

separately adjusted. In *Best* v. *Saunders* (1), where the bill of lading expressed that the goods were to be delivered to the consignee, "he paying freight for the same as per charter-party, with primage and average accustomed," it was held that the master was entitled to receive primage from the consignee, although the contract between the shipowner and the agents of the consignee (there being no charter-party) was for £5 per ton freight, and did not notice primage; and although the master contracted with the shipowner to receive a sum certain "in lieu of all cabin and other allowances, to commence from the day of victualling the ship, and for which he is to mess the officers." Lord Tenterden directed the jury that a receipt of cargo by the defendant under a bill of lading, stating that delivery was to be made on payment of freight "with primage and average accustomed," threw on the defendant the burden of proving that there were circumstances to defeat the operation of those words. In his lordship's opinion, a receipt of freight by the shipowner was not sufficient to prevent the master suing for the primage in his own name. His lordship intimated that if, as between the owner and master, the master had no right to it, or if the contract between the owner and shipper excluded the right to it, that either of these facts would have been an answer. The jury intimated a strong opinion that, wherever primage was not to be paid, the usage was to strike the above words out of the bill of lading, and found a verdict for the plaintiff.

Where there is a written agreement between the master and owners of a ship, not mentioning *primage*, and the owners have received payments in respect of primage from the freighters, the master by usage of trade is entitled to such payments (2).

In *Caughey* v. *Gordon* (3) the charterer engaged to ship in Australia a full cargo for a port in England at a freight of 60s. per ton *in full*, ship paying all port charges, pilotages, and towages; the freight to be paid

(1) 1828, M. and M. 208. (2) *Charleton* v. *Cotesworth*, 1825, R. and M. 176.
(3) 1878, 3 C.P.D. 419.

in cash on right delivery of cargo at port of discharge, less advances, exchange, and commission; the captain to sign bills of lading for cargo as presented, at any rate of freight required by charterer; but should the total freight by bills of lading amount to less than the total chartered freight, the difference to be paid the master in cash before sailing. The master (who was paid a fixed salary, "to include all charges and allowances") signed a bill of lading for the whole cargo, making the goods deliverable to "order or assigns, freight to be paid in cash at port of discharge, the rate of discharge, rate of freight, and other conditions as per charter-party, with 5 *per cent. primage in cash on delivery as customary.*" The cargo was received at the port of discharge by the defendants, the indorsees of the bill of lading, as agents of the charterer, and the freight paid. It was held that the defendants were not liable for primage.

Unusual now for master to receive primage.

Evidence was given in the above case that it had then, in the year 1878, become the custom for a master's salary to include all gratuities such as primage. This accounts for the disappearance of these actions even where primage is still payable by the shipper (1).

Gratuity to master.

In *Seeger* v. *Duthie* (2), where the defendant chartered from the plaintiff the ship of which the latter was master, and agreed to pay £1400 freight, "with a gratuity of twenty-five guineas to the master," it was held that the defendant could not set up the master's misconduct as a defence to an action for the gratuity, but that he must seek his remedy by a cross-action.

(1) Abbott, 14th Edit., 656. (2) 1860, 29 L.J. C.P. 253, 259.

CHAPTER II

WHEN PAYABLE

Where whole Freight is due

Payment on delivery implied.

"PRIMA-FACIE freight is not payable except upon delivery of the cargo, and there must be special provisions sufficiently clearly expressed in the contract between the parties to oust that presumption" (1). In such cases the readiness to deliver at the port of discharge is a condition precedent to the shipowner's right to have the freight. Unless the goods have been carried to that port, and are there ready to be delivered, the freight has not been earned.

Freight when due at common law.

Freight at common law is not due until it is earned; and as the carrier's contract is in its nature entire, nothing short of complete performance satisfies the common law, unless the freighter himself interferes to prevent it. The law on this point is stated by Lord Ellenborough in *Hunter* v. *Prinsep* (2). He said: "The principles which appear to govern the present action are these: the shipowners undertake that they will carry the goods to the place of destination, unless prevented by the dangers of the seas or other unavoidable casualties; the freighter undertakes that, if the goods be delivered at the place of their destination, he will pay the stipulated freight; but it was only in that event, viz. of their delivery at the place of destination, that he, the freighter, engages to pay anything. If the ship be

(1) Per Collins, M.R., in *London Transport Company* v. *Trechmann*, 1904, 1 K.B. 635; *The John*, 3 W. Rob. 170.

(2) 10 East. 394.

disabled from completing her voyage, the shipowner may still entitle himself to the whole freight by forwarding the goods by some other means to the place of destination ; but he has no right to any freight if they be not so forwarded, unless the forwarding them be dispensed with, or unless there be some new bargain upon the subject. If the shipowner will not forward them, the freighter is entitled to them without paying anything. One party, therefore, if he forward them, or be prevented or discharged from so doing, is entitled to his whole freight ; and the other, if there be a refusal to forward them, is entitled to have them without paying any freight at all. The general property in the goods is in the freighter ; the shipowner has no right to withhold the possession from him, unless he has either earned his freight or is going to earn it. If no freight be earned, and he decline proceeding to earn any, the freighter has a right to the possession. The captain's conduct in obtaining an order for selling the goods, and selling them accordingly, which was unnecessary, and which disabled him from forwarding the goods, was in effect declining to proceed to earn any freight, and therefore entitled the plaintiff to the entire produce of his goods, without any allowance for freight" (1).

Shipowner must forward goods in another ship, where ship disabled.

If the voyage is illegal, freight cannot be recovered. In *Muller* v. *Gernon* (2), an action was brought to recover freight on certain brandies brought from France to this country without a licence in 1810. The cargo was therefore contraband. But the defendant obtained permission from the Privy Council to have it landed upon condition of his immediately exporting it again. It was held that this permission did not make the voyage a legal one, so as to entitle the plaintiff to claim freight.

Voyage must be legal.

In *Blanck* v. *Solly* (3) a vessel freighted by the defendants from Dantzic to London was, on her arrival, and after part of the cargo had been delivered at the latter place, seized by the revenue officers, on suspicion that she was not Prussian built. The Treasury, on

(1) See also Eyre, C.J., in *Curling* v. *Long*, 1797, 1 B. and P. 636.
(2) 3 Taunt. 394. (3) 1817, 1 Moore 531.

petition, ordered the ship to be restored, on condition that the cargo should be exported, and on payment of £50 as a satisfaction to the seizing officers. It was held that this was sufficient to show that the voyage was illegal, without condemnation, and that although the freighters afterwards accepted and exported the cargo, according to the terms of the order, the master of the ship, having paid the sum demanded as a satisfaction to the seizing officers, admitted the illegality of the voyage, so as to preclude him from recovering freight (1).

Prevention of voyage by causes beyond shipowner's control.

Where causes beyond the shipowner's control prevent him from carrying the goods to their destination, he is not entitled to be paid any part of the freight, because he has not earned it. Nor does it make any difference that the causes were perils excepted by the contract (2).

Goods sold or left at port of refuge.

Nor is the shipowner entitled to the freight when the goods have been sold or left at a port of refuge, whether in consequence of their damaged condition, with the view of saving their value, or of enabling the master to raise the necessary funds for repairs in order to complete the voyage (3).

In *Hunter* v. *Prinsep* (4) an acceptance of the proceeds of the cargo, sold by the order of a Vice-Admiralty Court, the vessel having been wrecked but the cargo saved, did not entitle the shipowner to any freight out of those proceeds. The order for sale had been made by the Court, presumably in an action by the salvers, on the application of the master of the vessel, who acted to the best of his judgment for all concerned, but without the knowledge of the cargo owners. Lord Ellenborough distinguished the case from one in which, if the ship and goods had been restored in specie, the shipowner might have earned

(1) *Cf. Waugh* v. *Morris*, L.R. 8 Q.B. 202.

(2) *Cook* v. *Jennings*, 7 T.R. 381; *Metcalfe* v. *Britannic Ironworks Company*, 1 Q.B.D. 613; *Liddard* v. *Lopes*, 10 East. 526: *Curling* v. *Long*, 1 B. and P. 634; *Castel* v. *Trechman*, 1 C. and E. 276; *Osgood* v. *Groning*, 2 Camp. 466; *Birley* v. *Gladstone*, 3 M. and S. 205.

(3) *Vlierboom* v. *Chapman*, 13 M. and W. 230; *Hill* v. *Wilson*, 4 C.P.D. 329; *The Industrie*, 1894, P. 68; *The Teutonia*, L.R. 4 P.C. 171; *Hopper* v. *Burness*, 1 C.P.D. 137.

(4) 10 East. 378.

his full freight by carrying the goods on to their destination; and where the possibility of doing so had only been prevented by the act of the Court in making a sale pending the suit, without any fault of the shipowner.

Acceptance of proceeds of sale of cargo.

"However just it may be that a substitution of money for goods, made by the authority of a competent tribunal, shall be equivalent to the actual restitution of the goods themselves, as far as respects all interests in and liens upon that fund, and however reasonable it may be that an owner thus taking the substitute, which requires no further conveyance, should be considered as virtually dispensing with the further duty of the shipowners, which would have remained to be performed if the goods had still continued in specie, yet no such dispensation with the duty of further conveyance on the part of the owner of the goods can be implied in a case like the present, in which the further conveyance of them is rendered impossible by an act of the immediate agent of the shipowners themselves, to which he, the owner of the goods, is neither actually nor virtually consenting by himself, or any agent empowered to consent on his behalf, and to which he is not compelled to submit by any regular exercise of legal authority in any quarter whatsoever, and from which he can, according to what is contended for on the part of the defendants, derive no benefit whatever, inasmuch as the *pro rata* freight claimed by them exceeds the whole amount of the proceeds of the goods sold" (1).

In *Western Transportation Company* v. *Hoyt* (2) it was held that a carrier, who has contracted to transport goods and deliver them to the consignee, but who, on the arrival of the goods at their destination, stores a portion instead of delivering them, is not entitled to freight, nor even to *pro rata* freight on the portion stored, although the consignee may have taken the goods, indemnifying the warehouseman against any claim for freight. *Pro rata* freight is earned only

(1) Per Lord Ellenborough, 10 East., at p. 393. (2) 1877, 69 N.Y. 23.

where there is a voluntary acceptance at an intermediate port, justifying the inference that further carriage was dispensed with. Where the carrier has failed to perform his own contract, he may still recover his advances for charges of a previous carrier under an independent contract, although his bill of lading is for carriage and delivery upon payment of freight and charges.

Recovering charges of a previous carrier.

The master of a ship has, *prima facie*, no authority to sell the cargo. In order to justify a sale of the cargo without the authority of the owners of the cargo, he must show (*a*) an urgent necessity for sale, and (*b*) that he had no power of communicating with the owners of the cargo so as to take their instructions (1).

Sale at port of refuge in cargo's own interest.

In *Vlierboom* v. *Chapman* (2) a cargo of rice, shipped at Batavia, was, by the bill of lading, to be delivered at Rotterdam to the plaintiff, he paying freight for the same. The vessel having encountered a hurricane, was compelled to put into Mauritius, where the rice having been found to be damaged, and in a state of rapid putrefaction, was, of necessity, sold by the master, who acted *bona fide* but without the knowledge of either the shipper or shipowner. It was held, under the above circumstances, that no freight was due, either for the whole voyage or *pro rata itineris*. Parke, B., however, said: "It is difficult to conceive any conjunction in which such a presumption could be made; for the agency of the master from necessity arises from his total inability to carry the goods to the place of destination, which dispensed with the performance of that primary duty altogether, and the right to freight *pro rata* from the presumed waives on the part of the shipper of the performance of a duty which the master was ready to execute. . . . The truth is, that the goods were in the same situation as to the claim for

(1) *Acatos* v. *Burns* (1878), 3 Ex. D. 282. See also *Australasian Steam Navigation Company* v. *Morse*, L.R. 4 P.C. 222; *The Hamburg*, 33 L.J. Ad. 116; *The Bonaparte*, 8 Moo. P.C. 459; *Tronson* v. *Dent*, 8 Moo. P.C. 419; *Atlantic Mut. Inst. Co.* v. *Huth*, 16 Ch. D. 474; *Cannan* v. *Meaburn*, 1 Bing. 243; *Ewbank* v. *Nutting*, 7 C.B. 797.

(2) 13 M. and W. 230.

freight as if they had been abandoned by the shipowner and left behind at the Mauritius, and there sold by the owner."

Where goods are sold at intermediate port, owner must have had option, to entitle shipowner to freight.

To entitle a shipowner, in the absence of a special contract, to demand *pro rata* freight, where the goods have been sold at an intermediate port (being so much damaged as not to be worth forwarding), it must be shown that the owner of the goods had an option of having them sent or of accepting them at such intermediate port. A ship sailed from Riga for Hull with a general cargo and was stranded, but was afterwards got off (part of the cargo having been washed out of her and part jettisoned) and towed into Copenhagen, where her cargo was discharged, and the ship, having been repaired at considerable expense, was sent on to Hull after a delay of about two months, with some of her cargo on board, other part having been sent on by the master in other vessels. The plaintiffs' goods were so much damaged as not to be worth sending on, and were (properly, but without the plaintiffs having an opportunity of exercising an option) sold at Copenhagen, and an average adjustment took place there according to Danish law, under which the plaintiffs were charged with *pro rata* freight from Riga to Copenhagen. In an action for the price realised by the sale at Copenhagen, it was held that the shipowners were not entitled to deduct the general average expenses ascertained by the adjustment at Copenhagen, nor *pro rata* freight (1). Lindley, J., said (2): "In this state of the authorities, it is necessary to consider the matter on principle. The duty of the shipowner is to complete the voyage if he can. If, owing to perils of the seas, he is compelled to put into an intermediate port for repair, his duty is to refit, and carry on such part of the original cargo as is fit to be carried on. If this is done, a policy on the ship for the original voyage will cover a loss sustained after she has been repaired and is sailing from the port of repair to her original port of destination; and a policy on her original cargo will still cover so much of such cargo as is being carried in her between

(1) *Hill* v. *Wilson*, 1879, 4 C.P.D. 329. (2) 4 C.P.D. 333.

the same ports. In a case of this description, the original voyage is not regarded as broken up into two, viz., first, into one voyage from the port of sailing to the port of refuge, and secondly, into another voyage from such port to the port of destination. Again, if the shipowner, being unable to repair his ship, tranships the cargo and sends it home in some other ship, which he may do, still, as between him and the original consignees of the cargo, the original voyage is treated as continuing, in the absence of some agreement to the contrary. This appears from *Shipton* v. *Thornton* (1), where the freight payable in such cases is discussed. Further, in a case of this description, a policy on the cargo for the original voyage will cover such cargo when transhipped in order to complete such voyage" (2).

By a charter-party, in usual English form, made in England between the agents of the German owner of a German vessel and the defendants, who carried on business in England, the vessel was chartered to the defendants to load a cargo of rice at Bassein and deliver the same as ordered, at a port in the United Kingdom or on the Continent between Havre and Hamburg, the freight to be paid on right delivery of the cargo. On the voyage the vessel encountered bad weather and had to put into a port of distress. A quantity of the rice was found to be so much damaged by sea water that it could not be carried on, and was condemned and sold. In an action by the shipowner to recover freight in respect of the rice so sold, the plaintiff contended that the charter-party was governed by the law of the flag, and that, under German law, full freight was payable in respect of the rice justifiably sold at the port of distress. The Court of Appeal held that, under the circumstances, the contract was an English contract, to be construed according to English law, and that therefore no freight was payable in respect of the rice sold at the port of distress (3).

Law of the flag.

(1) 9 Ad. and E. 314. See also *Moss* v. *Smith*, 19 L.J. C.P. 225.
(2) Arnould on Insurance, 2nd Edit., 491.
(3) *The Industrie*, 63 L.J. Adm. 84.

In *Hopper* v. *Burness* (1) freight was payable by the terms of a charter-party upon delivery of cargo at the port of destination. The ship meeting with sea damage from heavy weather, the captain at an intermediate port justifiably sold part of the cargo shipped by the charterer to raise funds for the necessary repairs. The cargo so sold fetched more than it would have done if carried to the port of destination. The ship having completed her repairs, proceeded to the port of destination with the remainder of the cargo. A general average statement was afterwards made up, under which the charterer received from the shipowner the amount realised by the cargo sold at the intermediate port. The shipowner claimed from the charterer freight *pro rata itineris* on the cargo so sold. It was held, that he was not entitled to such freight, for the master had put it out of his power to carry on the goods by selling them, and the shipper had no option with regard to the sale.

Sale to raise funds for repairs.

But where a claim had been made by the shipowner for *pro rata* freight, and he had stopped certain proceeds of the cargo for it, and a promise was made to pay the *pro rata* freight in consideration of the proceeds being liberated, it was held that the promise was founded on a good consideration and might be enforced (2).

Where goods have to be sold, destroyed, or abandoned during the voyage, owing to some inherent defect in themselves, no freight becomes payable under the ordinary contract, or under the contract which is implied by law in the absence of express agreement (3). But where the goods have been brought to their destination, and are ready to be delivered, freight becomes payable although the goods are damaged or deteriorated, and not in the condition in which they were shipped, even though the damage is so great that the things are not worth freight payable upon them, and though that damage has arisen owing to the fault of the master and crew (4).

Inherent defect in goods carried.

Where the owner of a vessel has an opportunity of

(1) 1876, 1 C.P.D. 137. (2) *Thornton* v. *Fairlie*, 8 Taunt. 354.
(3) Abbott, 5th Edit., 274.
(4) *Dakin* v. *Oxley*, 33 L.J. C.P. 115; *Shields* v. *Davis*, 6 Taunt. 65; *Hotham* v. *East India Company*, 1 Dong. 272.

examining goods shipped on board of her, no warranty on the part of the owner of the goods can be implied that they are fit to be carried on the voyage (1).

Actual delivery not necessary.

Actual delivery of the cargo is not necessary to entitle the shipowner to freight; if he is ready to deliver at the proper place, the freight is then due. Of course he may be entitled to liens upon the cargo for demurrage or general average, but if these charges are met, he must be able and willing to deliver the goods before he can claim the freight (2).

In the case of *Dakin* v. *Oxley* (3), it was there held that a charterer, whose cargo had been damaged by the fault of the master and crew, so as upon arrival at the port of discharge to be worth less than the freight, is not entitled to excuse himself from payment of freight by abandoning the cargo to the shipowner. Mr Justice Willes, in the course of his judgment in this case, refers to the laws of the Continental countries and the United States of America, and gives references to eminent authorities on the subject, and then thus states the result: "It ought to be borne in mind, when dealing with such cases, that the true test of the right to freight is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed; and according to the law of England, as a rule, freight is earned by the carriage and arrival of the goods ready to be delivered to the merchant, though they be in a damaged state when they arrive. If the shipowner fails to carry the goods for the merchant to the destined port, the freight is not earned. If he carry part, but not the whole, no freight is payable in respect of the part not carried, and freight is payable in respect of the part carried, unless the charter-party make the carriage of the whole a condition precedent to the earning of any freight—a case which has not, within our experience, arisen in practice."

True test as to the right to freight.

Mr Justice Willes then referred to *Luke* v. *Lyde*, and circumstances in which freight is payable *pro rata*

(1) *Acatos* v. *Burns*, 1878, 3 Ex. D. 282.
(2) See *Johnson* v. *Greaves*, 2 Taunt. 344. (3) 33 L.J.C. 115, 119.

itineris, and to cargo swelling or shrinking, and then continued: "In the case of an actual loss or destruction by sea-damage of so much of the cargo that no substantial part of it remains; as if sugar in mats, shipped as sugar, and paying so much per ton, is washed away, so that only a few ounces remain, and the mats are worthless, the question would arise whether, practically speaking, any part of the cargo contracted to be carried has arrived." His lordship then referred to the foreign codes on the loss of liquids, and added: "Where the quantity remains unchanged, but by sea-damage the goods have been deteriorated in quality, the question of identity arises in a different form; as, for instance, where a valuable picture has arrived as a piece of spoilt canvas, cloth in rags, or crockery in broken sherds, iron all or almost all rust, rice fermented, or hides rotten. In both classes of cases, whether of loss of quantity or change in quality, the proper course seems to be the same, viz., to ascertain from the terms of the contract construed by mercantile usage, if any, what was the thing for the carriage of which freight was to be paid, and by the aid of a jury to determine whether that thing, or any and how much of it, has substantially arrived. If it has arrived, though damaged, the freight is payable by the ordinary terms of the charter-party; and the question of fortuitous damage must be settled with the underwriters, and that of culpable damage is a distinct proceeding for such damage against the ship, captain, or owners" (1).

Questions whether any substantial part of cargo has arrived.

Quality of cargo entirely changed.

An instance of cargo being completely changed in quality is to be found in the case of *Duthie* v. *Hilton* (2).

To disentitle a shipowner to freight for the carriage of goods it is not necessary that they should be totally destroyed during the voyage. The destruction of their merchantable character is enough (3).

(1) *Cf. Gibbens* v. *Buisson*, 1 Bing. N.C. 283.

(2) 1868, 4 C.P. 138. See p. 33.

(3) *Asfar & Co.* v. *Blundell*, 1895, 8 Asp. N.C. 40. See also *Dickson* v. *Buchanan*, 13 Sc. L.R. 40; *Moorsom* v. *Page*, 4 Camp. 103; *Garrett* v. *Melhuish*, 4 Jur. N.S. 943; *Clements* v. *Russell*, 4 Ir. Ch. R. 318; *Sibson* v. *Ship Barcraig Co.*, 2 Ct. of Sess. Cas. (4 ser.) 91.

Contract to carry must be completely performed.

It is a general rule that the contract of a common carrier, for the conveyance of goods, must be completely performed by the delivering of the goods at the place of destination, before freight can be demanded.

In *Clendaniel* v. *Tuckerman* (1), an American case, where a carrier, upon his arrival at the place of delivery, reported himself ready to deliver his cargo, but the consignee was not ready to receive it, and the carrier's vessel, after waiting several days for an opportunity to discharge her cargo, was, while thus waiting, carried away by a freshet and capsized, and her cargo lost overboard, so that it could not be delivered to the consignee, it was held that freight was nevertheless recoverable. In such a case the carrier, having tendered a delivery of the goods, and being obliged, against his will, and without any fault or neglect on his part, to retain the possession, his contract as a carrier is performed, and he holds the goods as a mere bailee in deposit, liable only when chargeable with negligence. A carrier, having arrived with the goods at the place of destination and offered to deliver them, the owner or consignee is bound to receive them within a reasonable time. And if he neglects to do so, the carrier may, if practicable, leave the goods in store, and thus discharge himself from all further liability. But otherwise where a reasonable time has not elapsed (2).

Arrival must be at destined port.

The arrival must be at the destined port, and generally it must be at the usual discharging place for such a cargo at the port; but delivery may sometimes, under special circumstances, be given at other than the usual discharging places, and when this is so, readiness to deliver there entitles the shipowner to the freight. In *Treglia* v. *Smith* (3) goods were shipped under a bill of lading to be delivered "at the port of S. B., always afloat." It was found to be impossible to unload at S. B. without taking ground, and the master discharged the goods at K. L., the nearest place where

(1) 17 Barb. 184.

(2) *M'Kee* v. *Hicksher*, 10 Daly 393; *Western Transport Company* v. *Hoyt*, 69 N.Y. 230. See also *Fay* v. *Alliance Insurance Company*, 16 Gray 455.

(3) 1896, 1 Com. Cas. 360.

the vessel could lie in safety. In an action by the owners of the ship against the consignees of the goods for freight, it was held that the master acted reasonably in unloading at K. L., and that the owners were entitled to freight.

In *Stewart* v. *Rogerson* (1) the charterers refused to name a discharging wharf for the cargo, when the ship was ready and able to deliver it. The Court inferred from this a refusal to accept and pay freight on the cargo, and held the charterer liable in damages to the amount of the freight, although, owing to a subsequent arrest of the cargo in a collision suit, the shipowner was not in a position to deliver it. And in *Ogden* v. *Graham* (2) it was held that merchants who had contracted to name "a safe port" at which the vessel they had chartered was to discharge, had not fulfilled their obligation by naming a port to which it was physically possible the ship could go, but which had been closed by the government of the country.

Lump sum for voyage must be paid if voyage substantially performed.

Where the freight to be paid for a voyage is a lump sum, the shipowner seems, by the most usual form of contract, to be entitled to the freight if the voyage is substantially performed, although he does not deliver the entire cargo taken on board; but if the failure to deliver arises through a breach of contract or duty on the part of the shipowner's servants, the merchant would have his remedy by cross-action or counter-claim.

In *The Norway* (3) a charter-party stipulated that £11,250 lump sum would be paid for freight, on both the outward and homeward voyages, part payment to be by bills, the rest on true and final delivery of cargo at the port of discharge. A jettison of part of the cargo having been made, not owing to want of skill in the pilot, and part of the goods which were damaged being sold at an intermediate port, it was held by the Privy Council (*a*) there ought to be no deduction from the lump freight, because part of the goods were not delivered; (*b*) the master having demanded a larger

(1) 6 C.P. 424. (2) 1861, 31 L.J. Q.B. 26.
(3) 1865, 13 L.T. 50.

sum than he was entitled to, and in such a manner as to announce that tender of a smaller sum would be useless, this was a waiver of tender; (*c*) the proportion of freight forfeited for breach of guarantee as to capacity and draught of vessel might be deducted.

The Privy Council said: "The next question is whether, in respect of the rice jettisoned and that which was sold, there ought to be a deduction from the lump freight because they were not delivered. We think that there ought to be no deduction. It is obvious that this question stands on a somewhat different footing from that on which it stood when it was decided by the learned judge below, because it was then taken for granted that the jettison and sale, and consequent failure to bring home the goods, were owing to the misconduct of the master. But in the view we take of this part of the case, it must be understood that they were owing to the perils of the sea, and that the master was free from blame in the matter. Although the lump sum is called 'freight' in the charter and bills of lading, yet we think it is not properly so called, but that it is more properly a sum in the nature of a rent, to be paid for the use and hire of the ship on the agreed voyages. The charter-party expresses that a sum of £11,250 is to be paid as freight for the 'use and hire of the ship,' and this lump sum is to cover both the outward and homeward voyages, without any distinction as to how much of it is to be attributed to the outward and how much to the homeward voyage. If this be so, the shipper had the full consideration for the money agreed to be paid. The ship took out the salt and received the rice on board, and performed her homeward voyage according to her engagement; and the event that by the act of God it became impossible to carry to the port of destination the rice jettisoned and the rice sold, ought not to affect the shipowner's right to receive the full amount of the stipulated payment. It was objected, on behalf of the respondent, that, by the charter-party, the remainder of the lump sum is made payable only on 'true and final delivery of the cargo at the said port of

Balance payable on true and final delivery of the cargo.

discharge.' But this does not necessarily mean that the whole cargo originally shipped must be delivered. It may well have been intended merely to fix the time for payment to be the time of the delivery of such cargo as the ship brings with her to the port of discharge, and it should be observed that the 'one-third in cash' is made payable on arrival at the port of delivery without any reference to the cargo the ship shall bring with her" (1).

This decision was followed by the Court of Common Pleas in *Robinson* v. *Knights* (2). There a charter-party from Riga to London provided that the ship should load a full and complete cargo of lath-wood, and deliver the same on being paid freight as follows: a lump sum of £315. There was the usual exception of sea risks, and the freight was to be paid half on arrival and the remainder on unloading and right delivery of cargo. Part of the cargo, loaded in accordance with the charter-party, was lost by perils of the sea, without any default of the master or crew. It was held that the shipowner was, on delivery of the remainder of the cargo, entitled to the full sum. Lord Esher said: "The rule is that in such a case the whole of the gross sum is payable, even although the freighter did not fully load the ship. In other words, the shipowner puts his ship at the disposal of the freighter, to load with a full cargo if the freighter pleases, but whether he pleases or not he is bound to pay the lump sum. It follows that what is really paid for is the use of the ship for carrying such cargo as the freighter chooses to put on board."

Both the above cases were approved of by the Exchequer Chamber in *Merchant Shipping Company Limited* v. *Armitage* (3). In that case a ship was to load at Colombo or Cochin, from the charterer's agents, a full and complete loading, and proceed to London, and discharge there, fire and other dangers of the sea excepted, a lump-sum freight of £5000 to be paid after entire discharge and right delivery of the cargo, in cash, two months after the date of the ship's report

(1) Br. and L. 408. (2) 1873, L.R. 8 C.P. 465.
(3) 1873, L.R. 9 Q.B. 99.

inwards at the custom-house. The master to sign bills of lading at any rate of freight required without prejudice to this charter-party ; but should the aggregate freight by bills of lading amount to less than the lump sum of £5000 already stipulated for, the difference to be deducted from the amount to be drawn for disbursements, and the balance, if any, to be paid in cash at the rate of exchange. The owners of the ship to have an absolute lien on the cargo for the amount of freight stipulated for, except as to the captain's draft for disbursements and commission, in case of default. The charterers to furnish cash for the disbursements of the ship at the port of loading, for which the master should give his draft on the owners. The ship loaded in due course, and the charterers estimated her bill of lading freight at £4995, 10s. 6d., but during the voyage the cargo caught fire, and the ship had to be scuttled to put the fire out. By this misfortune a portion of the cargo was destroyed, and, in consequence, when the ship reached London, the shipowners were only able to collect £3482, 7s. 10d., and the defendants had advanced to the master at Cochin £364, 14s. 1d. for disbursements of the ship, making together £3847, 1s. 11d. The shipowners brought their action for the balance of the £5000 not received by them from the consignees or by the master for disbursements. The defendants contended that the above clauses in the charter-party showed that the parties intended that the charterers were to give the shipowners the bill of lading freight, the shipowners taking the risk of the freight reaching the port of discharge. But it was held that this was not the effect of the clauses, as although the shipowners probably intended to trust to their lien on the bill of lading freight to secure such part of the £5000 as was not paid in cash or disbursements at the port of loading, there was nothing to show that the shipowners trusted to that lien alone (1).

(1) See also *Blanchet* v. *Powell's Llantivit Collieries Company*, 1874, L.R. 9 Ex. 74 ; *Ritchie* v. *Atkinson*, 10 East. 295 ; *Bell* v. *Puller*, 2 Taunt. 285 ; *Puller* v. *Stainforth*, 11 East. 232 ; *Stainforth* v. *Lyall*, 7 Bing. 169 ; *Blight* v. *Page*, 3 Bos. & P. 295, *n.*

Liability of merchant who fails to receive cargo at destination.

In *Cargo ex Argos* (1) a cargo of petroleum belonging to an English owner was shipped on board an English ship in London, under a bill of lading, whereby the goods were to be delivered in the port of Havre, subject to the usual exceptions. It was stipulated that demurrage was to be paid if the goods were not taken out within twenty-four hours after arrival. The local authorities refused to allow the petroleum to be landed at Havre, and compelled the ship to leave the port without unloading any of her cargo. The master, having made unsuccessful attempts to land the petroleum at other ports, returned to Havre, and transhipped it into a lighter in the roads while he went into dock, unloaded the rest of his cargo, and reloaded for his return voyage. He was then compelled by the authorities to reship the petroleum, and brought it back to London. No bill of lading was presented to him, or any request made by the consignees for delivery. It was held by the Privy Council (affirming the judgment of the Court below) (*a*) that the master, having been ready and able to give delivery in the harbour, and having kept the goods a reasonable time there for the purpose, the freight had been earned; (*b*) that all obligation on the part of a master to act for the merchant does not cease after a reasonable time for the latter to take delivery of the cargo has expired, and that therefore the respondent was entitled to compensation for bringing the goods back to England, as that was the best way of making them available to the appellant, and also for the expenses incurred at Havre; (*c*) but that he was not entitled to demurrage, and the expenses of attempting to enter other ports, as they were incurred before the ship was ready to deliver at all in the port of Havre.

As to the freight of the outward voyage, their lordships said (2): "It is clear that freight may be earned before actual delivery, if the goods have been brought to the port of arrival ready to be delivered according to the bill of lading. The rule was stated in the

(1) 1873, L.R. 5 P.C. 134, 158. (2) L.R. 5 P.C., p. 159.

judgment of the Court of Common Pleas, delivered by Willes, J., in *Dakin* v. *Oxley* (1). Arrival, of course, means 'at the destined port.'" And although the *Argos* never reached the quay at which it was usual to discharge petroleum, their lordships held this was not necessary, as, in their opinion, if she had been prevented by some accidental circumstance, such as the quay being under repair, or the approach to it being prevented by a wreck, the shipowner might have performed his contract by being ready to discharge in some other convenient part of the port (2). Meaning of "arrival."

As to the freight for the return voyage, their lordships said (3): "It seems to be a reasonable inference from the facts, that after the four days during which the petroleum had been lying in the harbour had expired, the authorities would not have allowed it to remain there. It was still in the master's possession, and the question is, whether he should have destroyed or saved it. If he was justified in trying to save it, their lordships think he did the best for the interest of the defendant in bringing it back to England. Whether he was so justified is the question to be considered." After noticing that the question had been left open by Sir James Mansfield in *Christy* v. *Row* (4), their lordships cited, among other cases, *Notara* v. *Henderson* (5), and said (6): "It results from them that not merely is a power given, but a duty is cast upon the master in many cases of accident and emergency to act for the safety of the cargo in such manner as may be best under the circumstances in which it may be placed; and that, as a correlative right, he is entitled to charge its owner with the expenses properly incurred in so doing." And although in the particular case the voyage was at an end, and the master had waited a considerable time for the consignee to take delivery, their lordships thought it ought not to be laid down that all obligation on his part to act for the merchant Freight for return voyage.

(1) *Supra.* (2) See also *Waugh* v. *Morris*, 1873, L.R. 8 Q.B. 202.
(3) L.R. 5 P.C., at p. 164. (4) 1808, 1 Taunt. 300.
(5) 1872, L.R. 7 Q.B. 225. (6) L.R. 5 P.C., at p. 165.

had ceased. And as their lordships found that bringing the goods back in the *Argos* was in fact the best and cheapest way of making them available to the defendant, and that they had been taken by him, and their value far exceeded the cost, it was held that the shipowner was entitled to freight for the return voyage.

Ship unable to reach port of discharge named by merchant owing to war.

Where a charter-party stipulates that a cargo is to be delivered at one of several safe ports as ordered by the consignees, and it becomes impossible by the outbreak of war, after an order is given, to deliver at the port named, and the master, without committing a breach of contract, puts into another port within the charter, he is entitled to a new order, and is not bound to deliver there without payment of full freight. In *The Teutonia* (1) the plaintiffs were assignees of a bill of lading of a cargo of nitrate of soda on board the defendant's vessel, shipped under a charter-party which provided that the cargo should be delivered at a safe port in Great Britain or on the Continent between Havre and Hamburg. The ship had been ordered at Falmouth to proceed to Dunkirk, but the master had justifiably stopped at Dover, on the outbreak of the Franco-German war, the ship being German. As the master refused to proceed to Dunkirk to discharge, the merchants claimed the cargo without payment of freight, on the ground that the cargo had not been delivered at its destination, and that as the breaking out of the war rendered the performance of the charter-party illegal on the part of the shipowner, the contract between the parties was dissolved. But Lord Justice Mellish, who delivered the judgment of the Privy Council, after taking notice that there was still a large number of ports named in the charter-party at which the cargo might be delivered, and admitting that, when the orders were given to proceed to Dunkirk, it was a proper place, as the war had not then broken out, said their lordships were of opinion that they ought not to hold that the contract between the parties had become impossible of performance, if by any reasonable construc-

(1) 1872, L.R. 4 P.C. 171.

tion it could be treated as still capable, in substance, of being performed. His lordship added (1): "Although it is true that the Court ought not to make a contract for the parties which they have not made themselves, yet a mercantile contract, which is usually expressed shortly, and leaves much to be understood, ought to be construed fairly and liberally for the purpose of carrying out the object of the parties; and it would seem very unjust to hold, because the consignee has named a port at which, without any fault on the part of the shipowner, it is impossible for the cargo to be delivered, that therefore the consignee is entitled to the possession of the cargo at the nearest neighbouring port, which, in a charter-party framed like this, must necessarily be one of the ports named in the charter-party, without paying for the cargo any freight whatever. The ship, without any breach of contract on the part of the shipowner, has arrived at Dover; the consignee has required the master to deliver him the cargo there, and he has not required the master to proceed to any other port except Dunkirk, where it was impossible for him to go. The charter-party provides what freight is to be paid if the cargo is delivered at Dover, and how it is to be paid." Accordingly their lordships held that the shipowner was entitled to hold the cargo under his lien for the chartered freight. His lordship added: "It becomes unnecessary to consider whether, if Dunkirk had been the only port of discharge, the shipowner would have been entitled either to freight *pro rata itineris*, or to a sum by way of compensation for the carriage of the goods from Pisagua to Dover, and they wish to be understood as giving no opinion on these questions, which, no doubt, are questions of great difficulty and importance." But in the case of *Castel* v. *Trechman* (2), Mr Justice Stephen held *pro rata* freight was not recoverable in circumstances similar to those suggested in the last sentence (3).

A mercantile contract should be construed liberally.

(1) L.R. 4 P.C. 182. (2) 1884, 1 Cab. and Ell. 276.
(3) *Cf. The Diana*, 5 C. Rob. 67.

Shipowner must be ready and able to deliver.

In order to claim the freight the shipowner must be ready and able to deliver the cargo in accordance with the contract, and it would seem that he must have been ready to deliver the goods during the whole period allowed by the contract to the consignee for taking delivery, unless, of course, the consignee has waived that obligation. If no time is fixed by the contract, the consignee is entitled to a reasonable time (1).

Consignee must be ready to pay at once.

When the freight is payable on delivery the consignee should be ready to pay it at once, concurrently with the delivery of the goods. He cannot require the whole of the goods contained in the bill of lading to be discharged before making any payment. "Where the cargo is of such a nature that there must be a series of deliveries, the law will not, I think, consider it as one transaction, having regard to the state of circumstances. After part of the cargo had been delivered, the master said: 'Pay me for it, and I will deliver the rest.' He did not stand upon his right to refuse to deliver before payment of the freight, but did the first act. The contract of the charter-party is to receive the goods simultaneously with payment of the freight, and the defendants have agreed to perform that duty. By not doing so they have broken their contract, and must compensate the plaintiff for the damage which they have occasioned to him" (2).

By the terms of a bill of lading freight was to be paid "one-third in cash on arrival at B., and two-thirds on right delivery of the cargo, by good and approved bills payable in London at four months, or cash, deducting usual interest, at the option of the shippers." The vessel arrived at B., the one-third freight was paid, and the consignee of the cargo declared his election to pay the remaining two-thirds in cash, less interest. It was held that the delivery of the cargo and payment of the balance of the freight were to be concurrent acts, and that the master was not bound to deliver the cargo

(1) See *Duthie* v. *Hilton*, 4 C.P. 138.
(2) Per Erle, J., in *Moller* v. *Young*, 24 L.J. Q.B., p. 221.

unless the consignee paid or was ready and willing at the same time to pay the balance of the freight (1).

By a charter-party it was provided that freight should be paid at the rate therein specified on the quantity of cargo safely delivered; but there was no stipulation as to when it was to be paid. The master required payment of the freight for the amount of cargo delivered each day over the ship's side into the consignees' boats, and refused to deliver any more cargo, on the consignees' refusing to pay on delivery as required. It was held by the Privy Council, affirming the judgment of the Supreme Court of Ceylon, that by the terms of the charter-party it was clear that the intention of the parties was, that the master should, on the arrival of the vessel at the port of destination, deliver, and the consignees receive, at the ship's side: and that as on such delivery and receipt the master ceased to be responsible, and to have any lien on the goods, he was justified in refusing to discharge the cargo without payment at the ship's side of the freight each day, on the quantity delivered, for his lien would be given up by delivery of the goods (2).

Payment at ship's side.

If the charterer or cargo-owner prevents the ship-owner from completing the voyage, full freight will be payable, although by the contract completion of the voyage and delivery at the destination were conditions precedent (3).

When completion of voyage prevented by freighter, full freight payable.

In *Cargo ex Galam* (4), W., a London merchant, shipped on board a French ship, the *Galam*, at Hayti, a cargo of wood to Europe. The *Galam* became unseaworthy at Terceira, was there condemned, and the cargo discharged and stored, and the captain raised £1000 from M. on respondentia bond on the cargo, payable on arrival at Falmouth, but did nothing to forward the cargo. W., hearing of the accident, chartered the *Mary Jane* to go to Terceira and bring

(1) *Paynter* v. *James*, 18 L.T. 449.

(2) *Black* v. *Rose*, 1864, 2 Moore P.C. N.S. 277. See also *Moller* v. *Young*, 24 L.J. Q.B. 217; *Gardner* v. *Treckmann*, 15 Q.B.D. 154; *Vogeman* v. *Bisley*, 2 Com. Cas. 81.

(3) But see *Smith* v. *Wilson*, 8 East. 437.

(4) 9 L.T. 550.

home the cargo and to call at Scilly for orders, which was done; but on reaching Scilly she ran ashore, and expenses were incurred in saving ship and cargo. W. then, in order to defeat the respondentia bond, ordered the cargo to proceed to Hamburg, instead of Falmouth, and discharge the cargo; but before the *Mary Jane* started, M., the respondentia bondholder, instituted a suit and arrested the cargo at Scilly, by warrant of the Admiralty Court. The cargo was afterwards removed to London for sale, and fetched £808. It was held by the Privy Council (reversing the judgment of the Admiralty Court) that the master of the *Mary Jane* not having known of the respondentia bond, and being prevented by the orders of the Court of Admiralty, occasioned by the default of the owner of the cargo, from carrying the cargo on to Hamburg, had a lien for freight on such cargo (1).

Acceptance of goods necessary to entitle to *pro rata* freight.

These cases, therefore, establish that acceptance of the goods is necessary to found an implied contract for the payment of freight *pro rata itineris*. The only exception seems to be if the cargo is sold at a port on the way owing to a default of its owner (2).

In *The Soblomsten* (2) the vessel and cargo were arrested at Great Grimsby in a salvage suit. The ship was surveyed and found not worth repairing, and was therefore abandoned by the master and crew. The owners of the cargo did not procure the release of the cargo, though they had notice that, if not released, it would be sold by order of the Court; and it was consequently sold. Dr Lushington said: "It might possibly be argued that the conduct of the owners of the cargo in not bailing the cargo, but allowing it to be sold, prevented the master from fulfilling his contract to carry the goods to their destination, and so earning his full freight. But freight *pro rata* is all which is asked by this motion, and I think that the conduct of the owners of the cargo amounts to a waiver by them to have their cargo from

(1) See also *Osgood* v. *Groning*, 1810, 2 Camp. 467; *Cullen* v. *Mico*, 1 Keb. 831.

(2) *The Soblomsten*, L.R. 1 Ad. and Ec. 293.

Great Grimsby to Bordeaux, and does not raise an implied promise that they would pay as *pro rata* freight." Earlier in his judgment in the same case, Dr Lushington said (1): "By British law the following points seem to me settled :—First, that upon the vessel becoming disabled at an intermediate port, the master is allowed a reasonable time within which to reship or tranship, so as to earn freight. Second, that the whole freight is payable if, by default of the owner of cargo, the master is prevented from forwarding the cargo from the intermediate port to its destination (*Cargo ex Galam*). Third, that no freight is payable if the owner of cargo, against his will, is compelled to take the cargo at an intermediate port. Fourth, that to justify a claim for *pro rata* freight there must be a voluntary acceptance of the goods by their owner at an intermediate port in such mode as to raise a fair inference that the further carriage of the goods was intentionally dispensed with (*Vlierboom* v. *Chapman*)." *Pro rata* freight.

In *Blasco* v. *Fletcher* (2) a ship was chartered by the defendants for a voyage from Liverpool to Havana, and loaded by them as a general ship, the freight being payable to the master. She went aground on the coast of Ireland. Subsequently she was got off with her cargo, both being damaged. S., one of the defendants, and who represented the freighters, visited the vessel, and was requested by the master "to act on behalf of the owners to the best of his judgment and ability." S. caused the cargo to be taken out, and sent back to Liverpool in another ship, which he himself engaged for that purpose. The ship herself went to Dublin and was there repaired. When the goods arrived at Liverpool they were inspected by various persons, and the result was that the defendants, on account of their damaged condition, determined to sell them. Before the sale took place, however, the master claimed the entire freight on the goods to the port of destination, or that they should be detained to proceed in his vessel when she was repaired. The defendants refused to accede to

(1) L.R. 1 Ad. and Ec. 297. (2) 1863, 32 L.J. C.P. 284.

this, and proceeded to sell the goods. In an action by the master against the defendants for wrongfully preventing him from carrying the goods and earning freight, the jury found in effect that the course taken by the defendants was the reasonable one to take, having regard to the interests of all parties concerned. It was held that on this finding the defendants were entitled to the verdict; that the authority to S. to act for the owners as well as for the shippers gave him authority to sell the cargo, under the circumstances which the jury had found to exist; and that this authority, having been partially acted on and expenses incurred under it, could not be countermanded.

In *The Friends* (1) the British ship *Friends* was chartered at Campeachy to deliver a cargo at Lisbon. It sailed therewith to the very entrance of the Tagus, and was there warned off by a blockading squadron. It continued some days with the fleet, but was afterwards blown out by a gale of wind. It was taken by a Spanish privateer, retaken by a British cruiser, and carried into Madeira, where the ship and cargo were sold by the recaptors to pay the salvage. A decree was afterwards made for the restoration of the ship and cargo, and the Court was called upon to consider what freight should be allowed under the circumstances of the case. The owner claimed the whole freight, as the ship had gone up to the very mouth of the destined port; the merchant contended that nothing was due, because the cargo was not delivered according to the terms of the charter-party. Lord Stowell thought that as the calamity was common to both parties, and was not attributable solely to either—for the ship could not have entered the port in ballast, nor the cargo in any other ship—equity suggested a division of the loss, and he therefore directed a moiety of the freight to be paid.

Merchant must pay full freight where he elects to sell cargo at port on way.

Lord Stowell, in the course of his judgment in the above case, said: "In the case of the American ships bound to France or Holland, which were brought into the ports of this country under the prohibitory law, the

(1) 1810, 1 Edw. Adm. Rep. 246.

full freight was pronounced to be due where the owners of the cargoes elected to sell here; where they did not elect to sell here, the Court left it to them to settle the freight with the owners of the ships. The Court considered a voyage from America to this country very nearly the same in effect as a voyage to those contiguous countries to which those vessels were originally destined; in all probability the markets of this country were not less favourable than in the blockaded ports, and no doubt the sale was effected with every attention to the interests of the owners of the cargo. In those cases the Court gave the master the full benefit of the freight, not by virtue of his contract, because, looking at the charter-party in the same point of view as the Courts of Common Law, it could not say that the delivery at a port in England was a specific performance of its terms. But there being no contract which applied to the existing state of facts, the Court found itself under an obligation to discover what was the relative equity between the parties. This Court sits no more than the Courts of Common Law do to make contracts between parties; but as a Court exercising an equitable jurisdiction, it considers itself bound to provide, as well as it can, for that relation of interests which has unexpectedly taken place under a state of facts out of the contemplation of the contracting parties in the course of the transaction."

Equitable jurisdiction the Court of Admiralty.

Abbott (afterwards Lord Tenterden), in his work on Merchant Shipping, 5th edit., p. 329, says: "The authority of the Court of Admiralty being exercised upon the ship and cargo *in specie*, or (which is in effect the same thing) upon the proceeds of a sale made under its own decrees, is very different from that of a Court of Common Law," and he then cites the above quotation from Lord Stowell's judgment in *The Friends*. The whole of the above quotations were cited by Sir R. Phillimore in the case of *The Teutonia* (1). The learned judge added (2): "It is true that this decision (3) was

(1) 1872, L.R. 3 Ad. and Ec. 419. (2) P. 421.
(3) *The Friends*, 1810, 1 Edw. Ad. Rep. 246.

given in the Admiralty Court exercising a prize jurisdiction; but Lord Tenterden makes no distinction on this head in citing the case as an authority on the subject of the practice of the Admiralty Court, and, I think, rightly, because the Court only applied to the subjects of the prize the general power which, as the history and origin of its jurisdiction show, it always possessed." The merchants appealed to the Privy Council, but that tribunal refused to consider the question of *pro rata* freight (1), as their lordships held the shipowner was entitled to his chartered freight.

The only essential difference between the case of *The Friends* and *Luke* v. *Lyde* is the acceptance of the cargo; for in the latter case the cargo was burdened with salvage to the amount of one-half, and the Court dealt with that circumstance by considering half the cargo as actually lost, and half only as delivered and accepted. In *Baillie* v. *Mondigliani* the whole had been originally sold, as in the case of *The Friends*, under a decree of a Court of competent jurisdiction, and the subsequent award of restitution could operate only upon the proceeds of the sale.

Ship disabled.

The freighter of goods on which freight was to be paid on delivery at the port of destination is bound to pay the whole freight originally contracted for, where transhipment has been found necessary and the goods have been delivered at the port of destination, although the master of the ship consigned the goods under fresh bills of lading in the second vessel to his own agent, and the freight was at a much lower rate than that originally contracted for. It would seem also that, if the freight in the second vessel exceeded that contracted for by the original bill of lading, the freighter would be liable for the additional freight also.

In *Shipton* v. *Thornton* (2) a ship loaded the defendant's goods at Singapore for England, but, having

(1) *The Teutonia*, L.R. 4 P.C., at p. 183.

(2) 1838, 9 A. and E. 314; 1 P. and D., p. 231. See also *Cannan* v. *Meaburn*, 1 Bing. 243; *The Gratitudine*, 3 C. Rob. 240; *The Hamburg*, 33 L.J. Ad. 116; *Atwood* v. *Sellar*, 3 Q.B.D. 342; *Niagara* v. *Cordes*, 21 Howard U.S.R. 7.

been compelled to put into Batavia, there transhipped them at a lower freight. The plaintiff, the shipowner, on the delivery of the goods, claimed the agreed freight. The defendant paid the freight from Batavia, and also a proportionate part of the original freight for the voyage from Singapore to Batavia. The plaintiff thereupon sued for the difference between the agreed freight and the sum paid by the defendant. It was held that the plaintiff, having performed the voyage, was entitled to the full freight.

Freight of goods transhipped.

Lord Denman, who delivered the considered judgment of the Court of Queen's Bench, discussed the law at great length. His lordship said: "It is clear that by the contract the shipowner, and the master as his agent, is bound to carry the goods to their destination in his own ship, if not prevented from doing so by some event which he has not occasioned, and over which he has no control. 'The master,' says Lord Tenterden, in his book on Shipping, 5th edit., p. 241, 'should always bear in mind that it is his duty to convey the cargo to the place of destination; this is the purpose for which he has been entrusted with it, and this purpose he is bound to accomplish by every reasonable and practicable method.' When, however, such an event has occurred to interrupt the voyage, as above defined, and the shipowner or master (for we think no distinction can be made between the two) has no opportunity of consulting the freighter, there seems to be much disagreement in foreign ordinances and jurists on the point whether or not he is bound to tranship, or whether, having contracted only to carry in his own ship, he is not absolved from further prosecution of the enterprise by *vis major*, which prevents his accomplishing it in the literal terms of his undertaking. By the Rhodian law, the laws of Oleron, art. 4, and the ordinances of Wisbuy, art. 16, the master was at liberty but was not bound to tranship. The old French ordinance, on the other hand, in precise terms imposed the obligation upon him: '*En cas que le vaisseau ne puisse être raccommodé le maître sera obligé d'en louer*

Foreign law as to transhipment.

incessament un autre,' art. 11, lit. Du Fret(1). The terms of this ordinance occasioned, however, much controversy, Pothier and Valin maintaining they were not imperative, except as a condition of earning full freight; Emerigon, on the other hand, insisting that the duty was strictly cast upon the master as the agent of the freighters(2). The modern French code appears to adopt this view of the question. The words of the Code de Commerce(3) are on this point almost the same as those we have cited from the ordinance; and it is stated by Chancellor Kent, who, in his *Commentaries*, vol. iii. pp. 207, 212 (3rd edit.), very ably and learnedly sums up the whole question, that Boulay, Paty, and Pardessus, in their Commentaries upon it, have agreed in holding to the construction adopted by Emerigon.

"All authorities, however, are in unison to this extent, that the master is at liberty to procure another ship to transport the cargo to the place of destination."

Summary of the law as to transhipment, by Dr Lushington.

The rights and duties of the master of a disabled ship towards the owners of cargo, with respect to transhipment, were summed up in the following terms by Dr Lushington in *The Bahia*(4): "The chief authorities on the subject are collected in Mr Brett's argument in the case of *Blasco* v. *Fletcher*(5), to which the Court is much indebted. The result may be stated as follows:— First, there is and can be no absolute obligation on the part of the master towards the owner of goods to forward them in the original vessel; although, of course, it is the duty of the master, in his capacity of agent to the shipowner, to do so if he can (*Benson* v. *Chapman*)(6). Second, it has never yet been decided that the master in any case is bound to tranship; all that has been

(1) Pothier, vol. ii., *Traité des Contrats de Louage Maritime*, part 1, s. 3, art. 2, § 3, num. 68; Valin, art. 11, lit. Du Fret, p. 618.

(2) *Traité des Assurances*, vol. i. chap. 12, s. 16.

(3) Art. 296—*Si le capitaine est contraint de faire radouter le navire pendant le voyage, l'affréteur est tenu d'attendre, ou de payer le fret en entier. Dans le cas où le navire ne pourrait être radoublé, le capitaine est tenu d'un louer un autre. Si le capitaine n'a pu louer un autre navire, le fret n'est du qu'à proportion de ce que le voyage est avancé.*

(4) 1864, B. and L. 292, 304, 305.

(5) 1863, 14 C.B. N.S. 147.

(6) 1848, 2 H.L. Cas. 696.

decided is that he is at liberty to tranship (*The Hamburg* (1) and cases there cited). Third, there is no absolute obligation to deliver at the intermediate port, unless full freight be paid. . . . The only exception to this rule is, where the master declines either to carry or to tranship—in short, abandons his contract altogether; in that case the consignee is entitled to his goods without any payment of freight at all (*Hunter* v. *Prinsep*)."

With regard to the second observation of Dr Lushington, it is to be noted that in none of the cases cited was the cargo perishable; for where they are, Lord Tenterden was of opinion that the master, if he cannot communicate with the merchant, ought to tranship or sell (2).

Shipowner's liability on transhipment.

A master who transhipps cargo with the object of earning freight for his owners, contracts with the substituted ship as agent for his owners, and not as agent for the merchants (3); he therefore makes the master and crew of the substituted ship the agents of his owners for the purpose of completing their contract with the merchants (4).

In *Matthews* v. *Gibbs*, defendants, merchants in London, by their agents in South America, chartered the ship P. to convey guano from South America to England. The agents advanced a portion of the freight to the captain. The vessel becoming unseaworthy, the captain entered into another charter-party in his own name with the plaintiff, the captain of the ship A., to convey the guano to its destination, and by the latter charter-party it was agreed that the freight should be the same as in the former. By a private agreement between the captain of the ship P. and the plaintiff, the latter agreed to convey the guano for a less freight, and to pay the difference to the former. Bills of lading were signed by the plaintiff, wherein the captain was called the shipper and the defendants the consignees. In an action by the plaintiff against the owners of the goods for freight, it was held (*a*) that the captain of the

(1) 1864, B. and L. 253.
(2) Abbott, 5th Edit., p. 240; 14th Edit., p. 528.
(3) *Matthews* v. *Gibbs*, 1860, 30 L.J. Q.B. 55, 62.
(4) *The Bernina*, 1886, 12 P.D. 36, 41.

ship P. entered into the charter-party with the plaintiff as the agent of the owners of the ship P., and not as the agent of the owners of the guano; (*b*) that if the captain of the ship P. acted for the owners of the guano, he could not bind them by such a contract; (*c*) that if the plaintiff had any lien for the freight, he could only have the same lien that the owners of the ship P. had, viz., a lien for the balance of the freight after deducting advances. "It must be understood that this implied authority of the master is coextensive with, and limited by, the necessity out of which it arises, just as it also is when he acts under extraordinary circumstances as the agent of his owners with regard to pledging their credit, or the ship itself, for necessaries for the ship. . . . Now in this case it is clear that there was no necessity for the contract into which Carlisle, the master, entered. There might be a necessity, under the particular circumstances, for his procuring other vessels in order to transmit the cargo to its place of destination; but there was none for his entering into a contract to pay freight at the rate of 70s. per ton" (1).

In *The Bernina* (2) the master, after a collision, had transhipped the goods into the *Avebury*, under bills of lading which excepted negligence in navigation. The transhipment was justifiable, and was done on account of the shipowners, with a view to earning the freight, and not on account of the plaintiff, the cargo owner. The original shipment was under a charter-party which did not except negligence. The goods were lost by negligent navigation of the *Avebury*. It was held by Sir J. Hannen that the shipowners were liable. They "were not entitled, as between themselves and the plaintiff, to substitute any other terms upon which the cargo was to be carried than those which had been agreed upon in the original charter-party."

Shipowner not bound to complete voyage to his own loss.

But the shipowner is not bound to employ another vessel to complete the voyage to his own loss. If, therefore, the only terms upon which another ship can

(1) Per Cockburn, C.J., 30 L.J. Ex., p. 63.
(2) 1886, 12 P.D. 36. See also *The Glenmanna* (1860), Lush. 115, 122.

be got are such that the whole agreed freight and more will be absorbed by the expenses of forwarding, the master is entitled, and in duty to the shipowner is bound, to abandon the voyage unless he can complete it in his own ship. And, presumably, the same is true where the freight has been paid in advance.

Must not be shipped at more than current freight.

A master transhipping cargo cannot bind the merchant by agreeing to give more than the rate of freight current at the port of transhipment; or, after making a charter-party for conveyance at the current rate, by accepting a bill of lading making the freight payable on a larger quantity of cargo than had been shipped.

In *Gibbs* v. *Grey* (1), a vessel chartered for a voyage from C. to L. was unable to complete her voyage by reason of one of the events excepted in the charter-party. The captain transferred the cargo to another vessel at an intermediate port without communicating with an agent of the owner of the cargo there, under a charter-party stipulating for freight at £5, 2s. 6d. per ton (the highest rate at the time), and stating the cargo to be 470 tons, more or less; but a difference of opinion arising upon the shipment of the goods between himself and the captain of the substituted ship as to their quantity, it was agreed between them that the freight should be paid on the full quantity stated in the charter-party, and accordingly a bill of lading was signed by the captain of the substituted vessel, stating the cargo to consist of 470 tons. It turned out that the cargo was only 344 tons, and the owner of the goods paid the amount beyond the freight on that quantity under protest. It was held, first, that the captain had no power to bind the merchant to pay freight except on the actual quantity transhipped, and that the surplus paid beyond that amount might be recovered back; secondly, that the charter-party did not contain any warranty that the goods consisted of 470 tons. It would seem, that if the representation of the captain of the vessel on which the goods were originally shipped as to their quantity had been false and fraudulent,

(1) 1857, 5 W.R. 608.

the merchant would not have been liable in respect of it. In the cross-action of *Grey* v. *Gibbs*, the Court expressed an opinion that a master transhipping had no authority to contract to load a full cargo on the substituted ship, or, in the event of her not being full, to bind the merchant to pay dead freight.

Whole freight payable on captured goods.

"If a neutral vessel, having enemy's goods, is taken, the captor pays the whole freight, because he represents the enemy by possessing himself of the enemy's goods *jure belli*; and although the whole freight has not been earned by the completion of the voyage, yet as the captor by his act of seizure has prevented its completion, his seizure shall operate to the same effect as an actual delivery of the goods to the consignee, and shall subject him to the full freight" (1). The freight was not, however, allowed by the Prize Court where there had been unfair conduct on the part of the vessel: as by using false papers, or carrying contraband (2).

Freight payable to captor.

Where the captor brings the cargo to its port of destination he is entitled to freight, but not otherwise; *pro rata* freight not given, even where the goods are nearly at their destination, and sold beneficially (3). Freight is not earned by the ship being brought by captors to Plymouth, the ship being bound to London (4).

Freight on enemy goods in neutral ship.

A neutral ship carrying enemy goods is entitled on condemnation of the goods to the whole freight, capture being equivalent to delivery (5). The freight payable upon enemy goods in neutral ships is not necessarily the chartered freight, as raised by war risk (6). The captor of enemy goods in neutral ship takes them with

(1) Per Sir W. Scott in *The Copenhagen*, 1 C. Rob. 289. See also *The Fortune*, Edw. Ad. 56; *The Racehorse*, 3 C. Rob. 101; *The Martha*, *ibid.*, 106, *n.*; *The Hoffnung*, 6 C. Rob. 231. *Cf. Luke* v. *Lyde*, 2 Burr. 882; *The Werldsborgaren*, 4 C. Rob. 17.

(2) *The Rising Sun*, 2 C. Rob. 104; *The Sarah Christian*, 1 C. Rob. 237; *The Mercurius*, *ibid.*, 288; *The Atlas*, 3 C. Rob. 299, 304, *n.*

(3) *The Vrow Anna Catharina*, 6 C. Rob. 271.

(4) *The Wilhelmina Eleonora*, 3 C. Rob. 234; *The Vrow Henrietta*, 5 C. Rob. 75, *n.*

(5) *The Copenhagen*, 1 C. Rob. 289; *The Prosper*, Edwards 76.

(6) *The Twilling Riget*, 5 C. Rob. 85.

the liability to pay freight (1). Freight is not allowed to the owner of a neutral ship carrying contraband of war (2).

Where Part of agreed Freight only is due

Where freight paid on quantity and part only of goods delivered.

Where by the terms of a charter-party the freight is made payable according to the quantity of goods, the merchant must pay for so much as shall be delivered. If a ship freighted to H. is prevented by restraints of princes from arriving, and the consignees direct the master to deliver the cargo at G. and accept it there, he may maintain an action upon an implied contract to pay freight *pro rata itineris*. And if the master be prevented by the default of the consignees or restraints of princes from delivering the whole cargo there, he shall be entitled to freight *pro rata* for the part delivered. If a ship be freighted on a single voyage outwards, and be prevented from delivering her cargo, it would seem that she is entitled to receive from the owner of the cargo freight for bringing it back, and demurrage from the time of her arrival at the port of loading and notice, till the owner receives the cargo, or the master has had time to discharge it, if abandoned by the owner, and that the master would not be entitled, upon losing the delivery, to cast away the residue of the cargo. If the master signs a bill of lading, expressing that upon delivery of the cargo freight is to be paid by the consignees, he does not thereby renounce his claim for freight against the consignor. It would seem that the master's right to exact payment of any part of the freight from the consignees does not arise till the delivery is completed or determined (3). In *Christy* v. *Row*, the ship *True Briton* was chartered for a voyage from Shields to Hamburg. The master engaged to take a full cargo of coals, and to proceed to Hamburg; and on his arrival to deliver the same to

(1) Per Lord Stowell in *The Tobago*, 5 C. Rob. 218, 222.
(2) *The Oster Risoer*, 4 C. Rob. 199.
(3) *Christy* v. *Row*, 1808, 1 Taunt. 300.

the merchant or his assigns, at such convenient place or places where the ship and cargo might safely come; and for the delivery to be at the rate of one working day per keel of coals. The merchant engaged to load the cargo, and also to receive it at Hamburg within the time limited, and to pay in full for the freight of the ship for the voyage, at the rate of £20 per keel, on delivery of the cargo, with two-third parts of the pilotage and port charges. Under this charter-party the merchant loaded seventeen keels of coals, with which the ship proceeded towards Hamburg, and arrived at Cuxhaven, so near to Hamburg that the voyage might have been completed in the course of the day; but the master, being ordered by the commander of His Majesty's ships on that station to proceed no further, because the French forces were approaching Hamburg, sent notice of his arrival to the merchant's correspondents at Hamburg, who desired him to sail as far as Gluckstadt, where they would send him lighters. The master accordingly sailed to Gluckstadt, and there delivered seven keels and one chaldron of coals into the lighters that were sent. The delivery was at the rate of one keel per working day. The ship stayed long enough to have delivered the whole quantity if lighters had been sent to receive it. On the ninth day the master returned to Cuxhaven, by order of the British Consul and of the commander of His Majesty's ships, the French having entered Hamburg; and shortly afterwards, by the order of the same persons, sailed away with the residue of his cargo and brought it back to Shields, having remained in the whole fifteen days only from his first arrival in Cuxhaven roads, being less than the time stipulated in the charter-party. This, however, contained the usual exceptions of perils of the seas and restraint of princes and rulers. And the master having by this restraint been prevented from delivering his whole cargo, was held entitled to the rateable freight for the quantity delivered, and also to the two-third parts of the pilotage and port charges.

In charters in which freight is payable in proportion

to the time during which the ship is occupied, the freight is in the nature of a rent paid for the use and hire of the ship, and the question as to when it is to be considered to be earned and payable to the shipowner depends entirely upon the intention of the parties, as shown by the contract. Difficulties of construction on this point have arisen because the clause in the charter-party which defines the time for payment frequently assumes the existence of conditions which may or may not be regarded as conditions precedent to the right to payment.

Apportionment of freight.

Time freights.

If the charterer is to pay at a given rate, in proportion to the time the ship is in his employment, no deduction will be allowed for time during which the vessel is laid up for repairs, unless there is a stipulation to that effect. And this is so even where the charter expressly makes it the duty of the shipowner to keep the vessel in repair. This also applies to other detentions. If the detentions occur through the default of the shipowner, the charterer may counter-claim against the shipowner (1).

A covenant in a charter-party of affreightment that the owner shall, at his expense, forthwith make the ship tight and strong, etc., for a voyage for twelve months, etc., and keep her so, is not a condition precedent to the recovery of freight, after the freighter had taken the ship into his service and used her for a certain period; but if the freighter be afterwards delayed or injured by the necessity of repairing her, he has his remedy in damages. But if the owner's neglect to repair in the first instance had precluded the freighter from making any use of the vessel, that would have gone to the whole consideration, and might have been insisted on as a bar to the action (2). A ship having been let to freight for twelve months, and for such longer period as the freighters should detain her, for which certain proportions of the freight were to be paid at the end of two,

(1) See *Inman S.S. Co.* v. *Bischoff*, 7 A.C. 670.

(2) *Havelock* v. *Geddes*, 10 East. 555; *Ripley* v. *Scaife*, 5 B. and C. 167; *United States* v. *Shea*, 152 U.S. 179; *Hough* v. *Head*, 54 L.J. Q.B. 294. But see cesser clause in time charters, p. 143; *Hogarth* v. *Miller*, 15 Ct. of Sess. Cas. (4 ser.) 599.

six, ten, and fourteen months, etc., it is no answer to a breach for non-payment of six months' freight, due at the end of the ten months, that the owner had covenanted to keep the vessel in repair during the time she was freighted, and that she was not in repair when the freighter shipped goods on board her during the twelve months, which made it necessary for him to unload and repair her, whereby she was unserviceable for part of the six months, and that he had paid the freight for all the time she was serviceable, and that she was not in his service for ten months in the whole; for it does not follow but that after she had been used by the freighter, she wanted repair without any default of the owner, or that he was guilty of any delay in making the repairs; and the freight would still run on during the time of repair. The freight being reserved at so much per month, was earned at the end of each month, although the stipulated times of payment were from four months to four months, and the ship was lost before the end of fourteen months. An allowance for extra men being covenanted to be paid by the freighter, the residue of which (after part payment) was not to be paid till the ship's discharge, or return from her voyage, and the ship having sailed on a voyage to St Domingo, where she arrived, but was burnt before her return, it was held that such loss was a discharge of her from the freighter's employment, as if by the act of the freighter, on which such extra allowance became payable (1).

No suspension of freight when vessel released from blockaded port.

A ship let to freight by the month, in attempting to enter a blockaded port by order of the freighters, is seized, and her cargo condemned; but being afterwards released, takes in other goods and delivers them to the freighters, according to the charter-party. It was held that there was no suspension of the freight during the detention of the ship (2).

By a charter-party the freighter covenanted to pay to the owner freight at and after the rate of so much per ton per month, for the term of six months at least,

(1) *Cf. Crozier* v. *Smith*, 1840, 1 M. and G. 407.
(2) *Cf. Moorsom* v. *Greaves*, 2 Camp. 626.

and so in proportion for less than a month, or for such further time than six months as the ship might be detained in the service of the freighter, until her final discharge, or until the day of her being lost, captured, or last seen or heard of; such freight to be paid to the commander of the ship in manner following, viz.: so much as might be earned at the time of the arrival of the ship at her first destined port abroad, to be paid within ten days next after her arrival there, and the remainder of the freight at specific periods. It was held that this constituted one entire contract, and that the arrival of the ship at her first destined port abroad was a condition precedent to the owner's right to recover any freight, and that the ship having been lost on her outward voyage, the owner was not entitled to recover freight at so much per calendar month to the day of the loss (1). "Where the freighter derives no beneficial use from the ship, there ought to be a clear, express stipulation in order to charge him with the payment of freight, and this charter-party contains no such stipulation" (2). Time charters.

The plaintiffs, who were the time-charterers of a ship, insured the freight against the usual perils. During the currency of the policy the ship was stranded, and there was a total loss of freight. The plaintiffs claimed that, in ascertaining the amount recoverable under the policy, they were entitled to add the commission they had actually paid for getting the charter-party. It was held that, in the absence of evidence of a custom or practice to include such commission, the plaintiffs were not entitled to recover it from the underwriters. By the charter-party it was provided that in the event of stranding or damage preventing the working of the vessel for more than twenty-four consecutive working hours, the payment of hire should cease until she should be again in an efficient state to resume her service. At the time of the stranding of the vessel there was still cargo on board which would have taken two days to discharge. The underwriters sought Commission for getting charter-party not recoverable from underwriters.

(1) *Gibbon* v. *Mendez*, 1818, 2 B. and Ald. 17.
(2) Per Bayley, J., 2 B. and Ald., at p. 24.

to deduct from the charterers' claim the two days' hire of the vessel which by the stranding was saved to the charterers. It was held that the underwriters were not entitled to make this deduction (1).

In *Brown* v. *Hunt* (2) the vessel was chartered for a round voyage from Boston to Savannah, thence to a port in the West Indies, and thence to Boston; with liberty to return from the West Indies to any port in the United States and from thence to Boston. The freight or hire was to be at a certain rate per ton per month, and so in proportion for a less time as she should be continued in the service, and was to be paid "in thirty days after her return to Boston." She proceeded to Savannah, carried a cargo from there to the West Indies, and another cargo back to Savannah. The latter cargo was discharged by June 23, 1812. On July 4 she sailed in ballast for Boston, and on July 14 she was captured by a British frigate and destroyed. It was held by the Supreme Court of Massachusetts that hire down to June 23 was payable, notwithstanding the non-arrival at Boston. For that purpose the voyages were distinct, and payment must be made for those which were accomplished.

Where voyages distinct.

Pro rata freight.

In *Lutwidge* v. *Grey* (3), decided by the House of Lords in 1733, Lutwidge, the owner of a ship called the *Wharton*, of Whitehaven, let his ship by a charter-party to Archibald Grey and others, merchants at Glasgow, for a voyage from Glasgow to Maryland or Virginia and back from thence to Glasgow, and was to receive freight from them for the cargo only, at the rate of £8, 12s. per ton of tobacco, computing four hogsheads to the ton; one half to be paid immediately after the ship's discharge at Glasgow, and the other half within six months after such discharge. The ship sailed to Virginia, delivered her outward cargo, and took on board from the merchant's factor a cargo of tobacco consisting of 199 hogsheads, part of which was their

(1) *The United States Shipping Company* v. *The Empress Assurance Corp.*, 1907, 12 Com. Cas. 142.

(2) 1814, 11 Mass. 45.

(3) Cited in Abbott (5th Edit.), 308; 14th Edit. 717.

property; the residue belonged to other persons, and was put on board by the factor to complete the lading, in pursuance of directions given to him for that purpose by his principals, in case the outward cargo should not enable him to purchase a full loading on their account. Grey & Co. insured their part of the cargo with persons living at Bristol; the other part was not insured. On the return homeward, the ship was unfortunately cast away at Youghal, in Ireland, which is within a very short distance of Glasgow, and part of the cargo, to the amount of 163 hogsheads, was saved by the assistance of the officers of the customs at Youghal and deposited in the Custom House there. Lutwidge, the owner, as soon as he knew of the misfortune, informed Grey & Co. of it, and told them he should provide another ship to transport the tobacco which was saved. Grey & Co. abandoned their part of the cargo to their insurers, and indorsed over the bills of lading to them. Lutwidge provided another ship at Youghal, but the insurers took the part of the cargo abandoned to them and conveyed it to Bristol. The agent of the proprietors of the other part of the cargo was willing to have it laded on board the ship thus provided, if the master thereof would sign bills of lading to deliver it at Glasgow, in conformity with the original charter-party; but the master refused to give such bills of lading, or to oblige himself to deliver it at Glasgow, offering only to give receipts obliging himself to deliver it in Great Britain; and the agent, suspecting that he meant to take it to Whitehaven and not to Glasgow, refused to deliver it to him upon those terms, and sent it by another vessel to Glasgow, where several hogsheads were found so much damaged that they were not entered at the Custom House, but burned at the King's scales there. Lutwidge brought an action against Grey and others for his freight. The House of Lords, on appeal from the Court of Session in Scotland, declared "that the respondents, Grey and others, were liable for the full freight of such of the goods as were given up to the insurers, and for the freight *pro rata itineris* of such of the

goods as were brought to Glasgow, notwithstanding some of the tobacco was found damnified and burned there."

Luke v. *Lyde*.

The next case on the subject was *Luke* v. *Lyde* (1), which came before Lord Mansfield in the Court of King's Bench on a special case, the case having previously come before his lordship at the Devonshire Assizes. "I was desirous," said his lordship, "to have the point reserved for the opinion of the Court, in order to settle it more deliberately, solemnly, and notoriously, as it is of so extensive a nature, and especially as the maritime law is not the law of a particular country, but the general law of nations: *non erit alia lex Romæ, alia Athenis: alia nunc, alia posthæ; sed et apud omnes gentes et omni tempore una cademque lex obtinebit.*" The facts of the case were these: Lyde shipped a cargo of 1501 quintals of fish at Newfoundland, on board the ship *Sarah*, belonging to Luke and others, to be carried to Lisbon; the freight was to be at the rate of 2s. per quintal. The price of the cargo at Newfoundland was 10s. 6d. per quintal. Luke and others also had on board a quantity of fish, their own property. The ship set sail on the 27th November 1756, and having proceeded seventeen days on her voyage, was taken, on the 14th December, by a French ship, within four days' sail of Lisbon, but retaken on the 17th December by an English privateer, and brought on the 29th into the port of Biddeford, in Devonshire. The French ship took out the master and all the crew, except one man and a boy. Lyde took his goods of the recaptors and paid 5s. per quintal salvage, the value of the fish being then estimated at 10s. per quintal. The fish could not be sold at all at Biddeford, nor at any other port in England, for more than 10s. per quintal, clear of charges and expenses; and it was supposed by every person that the fish would be disposed of to the greatest advantage at Bilbao, in Spain, to which place Lyde sent it without delay; but it fetched there only 5s. 6d. per quintal, clear of freight and expenses, being little more than one-third of the prime cost and salvage.

Definition of maritime law by Lord Mansfield.

(1) 1759, 2 Burr. 883.

The freight from Biddeford to Lisbon was higher than from Newfoundland to Lisbon. The owners, Luke and others, abandoned the ship to their insurers, and never offered to convey the goods to Lisbon, nor were ever required to do so by Lyde, the merchant. In an action brought by the owners, Luke and others, for freight, the Court decided that they should recover freight as for half the quantity of the cargo shipped, considering the other half to be absolutely lost by the expense of salvage, and in the proportion of seventeen days, during which the ship had proceeded on the voyage, to twenty-one days, within which the voyage would have been completed if the capture had not happened; that is, £60, 14s., being $\frac{17}{21}$ of £75, the half of £150. And Lord Mansfield said(1): "If a freighted ship becomes accidentally disabled on its voyage, without the fault of the master, the master has his option of two things—either to refit it (if that can be done within convenient time), or to hire another ship to carry the goods to the port of delivery. If the merchant disagrees to this, and will not let him do so, the master will be entitled to the whole freight of the full voyage; and so it was determined in the House of Lords in the case of *Lutwidge and Horn* v. *Grey*. As to the value of the goods, it is nothing to the master of the ship whether the goods are spoiled or not, provided the freighter takes them; it is enough if the master has carried them, for by doing so he has earned his freight, and the merchant shall be obliged to take all that are saved or none; he shall not take some and abandon the rest, and so pick and choose what he likes, taking that which is not damaged, and leaving that which is spoiled or damaged. If he abandon all, he is excused freight: and he may abandon all, though they are not all lost. (I call the freighter the merchant, and the other the master, for the clearer distinction.) Now, here is a capture without any fault of the master, and then a recapture: the merchant does not abandon, but takes the goods, and does not require the master to carry them to Lisbon,

Judgment of Lord Mansfield in *Luke* v. *Lyde*.

(1) 2 Burr. 887.

the port of delivery. Indeed, the master could not carry them in the same ship, for it was disabled and was itself abandoned to the insurers of it; and he would not desire to find another, because the freight was higher from Biddeford to Lisbon than from Newfoundland to Lisbon (1). There can be no doubt that some freight is due, for the goods were not abandoned by the freighter, but received by him of the recaptor. The question will be, What freight? The answer is, A rateable freight, *i.e. pro rata itineris.* If the master has his election to provide another ship to carry the goods to the port of delivery, and the merchant does not even desire him to do so, the master is still entitled to a proportion, *pro rata*, of the former part of the voyage. I take the proportion of the salvage here to be half of the whole cargo upon the state of the case as here agreed upon. And it is reasonable that the half here paid to the recaptor should be considered as lost; for the recaptor was not obliged to agree to a valuation, but he might have had the goods actually sold, if he had so pleased, and taken half the produce, and, therefore, the half of them are as much lost as if they remained in the enemy's hands: so that half of the goods must be considered as lost, and half as saved. Here the master had come seventeen days of his voyage, and was within four days of the destined port when the accident happened; therefore he ought to be paid his full freight for $\frac{17}{21}$ parts of the full voyage for that half of the cargo which was saved." His lordship then refers to the *Consolato del Mare* and other ancient authorities, and concludes thus: "It is quite immaterial what the merchant made of the goods afterwards, for the master had nothing at all to do with the goodness or badness of the market; nor indeed can that be properly known till after the freight is paid, for the master is not bound to deliver the goods till after he is paid his freight. No sort of notice was taken of that matter in the case of *Lutwidge and Horn* v. *Grey* in the House of Lords; and yet there the tobacco was damaged very greatly, even so

(1) But see the reasons given by Baron Parke in *Vlierboom* v. *Chapman.*

much that a great part of it was burnt at the scales at Glasgow."

In the subsequent case of *Baillie* v. *Moudigliani* (1), the ship sailed with goods from Nevis for Bristol, but on the voyage was taken and carried into France and condemned there. An appeal was lodged, and the sentence was reversed and the ship and cargo were decreed to be restored. Before the sentence of restitution, the ship and cargo had been sold; the merchants received the price of the goods, and paid freight to the master *pro rata itineris*; and having caused the goods to be insured before the commencement of the voyage, brought an action against the insurers to recover from them the freight so paid to the master. The Court held that this payment could not be recovered upon this insurance. But Lord Mansfield said: "As between the owners of the ship and cargo, in the case of a total loss, no freight is due; but as between them, no loss is total where part of the property is saved, and the merchant takes it to his own use. In this case the value of the goods was restored in money, which is the same as the goods, and therefore freight was certainly due *pro rata itineris.*" *Baillie v. Moudigliani.*

So where a ship under a neutral flag, and with neutral papers, was in time of war driven into a British port by stress of weather, and seized, together with the cargo, and libelled in the Court of Admiralty for condemnation, on account of various circumstances, which led to a suspicion that both ship and cargo were the real property of the enemy; and the neutrality of the cargo being proved before proof of the neutrality of the ship arrived, the cargo was restored during the detention of the ship, and part thereof was sent in other vessels to the place of destination, and the residue conveyed to London; the judge of the Admiralty Court, after having decreed the restoration of the ship, decreed also that the merchants should pay freight for their goods for the proportion of the voyage performed (2). *The Copenhagen.*

(1) 1785, cited in Park on Insurance, vol. i. p. 90, 7th Edit., 1817.

(2) *The Copenhagen*, 1779, 1 Rob. A.R. 289; Abbott, 5th Edit., p. 314; 14th Edit., p. 721.

The Isabella Jacobina.

On the other hand, in *The Isabella Jacobina* (1) a cargo of pilchards had been shipped on a Swedish vessel at Radstom, for Venice, under a charter-party. The vessel had proceeded a few days on her voyage, but had met with bad weather and became leaky, and put back to Falmouth. There she was detained under an embargo placed upon Swedish ships. The cargo, owing to its nature, could not wait until the embargo might be taken off, and was, therefore, unshipped and given up to its owners. It was held in the Admiralty Court that no freight was payable, Falmouth being "so much in the neighbourhood of Radstom that it may be taken as the port of departure"; but that if any expenses had been incurred by the ship on account of the cargo, they must be paid (2).

Mitchell v. *Darthez.*

In *Mitchell* v. *Darthez* (3) a ship called the *Jane* was chartered to carry a cargo of coals or other goods to the River Plata and there deliver them, and then reload and proceed to a port between Gibraltar and Antwerp and deliver. "Freight for the said voyage out and home, £1300 in full if delivered at Gibraltar"; £200 of it to be paid in London, cash for necessary expenses to be advanced at the River Plata, "and the remainder to be paid on final delivery of the homeward cargo." The master to sign bills of lading without prejudice to the charter-party. The *Jane* carried out coals in lieu of ballast under a bill of lading which stated that freight was to be paid as per charter-party. Part of these coals were delivered at Buenos Ayres, but part remained on board as ballast for the return voyage. A cargo of hides was put on board at Buenos Ayres, to be carried to Gibraltar under a bill of lading, which made £340 freight payable upon them. On her voyage to Gibraltar the *Jane* put into Fayal, distressed and damaged to such an extent that she was condemned. Part of the hides were sold as damaged, a few were sold as sound, and the coal also was sold. The proceeds of all these

(1) 4 C. Rob. 77. See also *Heslop* v. *Jones*, 2 Chit. 550.
(2) See also *Blasco* v. *Fletcher* (1863), 32 L.J. C.P. 284.
(3) 2 Bing. N.C. 555.

were applied in paying the expenses at Fayal, including the cost of reloading those hides which were afterwards sent on. The master of the *Jane* returned to England, and down to the time of his starting no vessel had arrived able to carry on the cargo; but he left instructions with the British Vice-Consul at Fayal to forward the remainder of the hides (about two-thirds of the whole cargo) to Gibraltar at the earliest opportunity. The Vice-Consul afterwards chartered the schooner *Flora*, on the part and behalf of the owners of the cargo of hides landed from the brig *Jane*, to proceed therewith to Gibraltar and there deliver them on payment of £360 freight, with primage 5 per cent. The hides were received by the consignees in Gibraltar, and they paid the *Flora's* freight upon them. An action was then brought by the owner of the *Jane* against the charterers for freight under the original charter-party. It was held that the plaintiff was not entitled to the chartered freight, as the homeward voyage had not been performed, and the hides had not been carried to their destination in fulfilment of the charter-party. Nor was the plaintiff entitled to any freight, *pro rata itineris*, for the voyage from England to Buenos Ayres. But it was held that he was entitled to claim a reasonable freight for the conveyance from Buenos Ayres to Fayal of that portion of the goods which came to the hands of the freighters and was accepted by them. Tindal, C.J., said(1): "The goods were forwarded by the Vice-Consul, acting as the agent of the freighters; but the Vice-Consul was desired by the master of the *Jane* to forward them, though not desired to forward them on behalf of the shipowner. The agents of the freighters at Gibraltar have accepted the goods, paid the freight, and thereby recognised the act of the Vice-Consul as their agent. The case therefore must stand in the same position as if the freighters had accepted the goods of the master of the *Jane* at Fayal, and conveyed them on their own account to Gibraltar, in which case we think that they would be liable to pay freight for that portion

(1) 2 Bing. N.C., at pp. 570, 571.

of the voyage performed in respect of the goods accepted. At what rate the freight is to be calculated is the remaining question to be considered, and we are of opinion that the shipowner, under the circumstances of this case, cannot claim any remuneration beyond a reasonable freight from Buenos Ayres to Fayal, the amount of which the arbitrator will determine. The freight agreed upon by the charter was not of an ordinary kind, but a gross sum to be paid in case of the performance of an extraordinary voyage. That voyage has not been accomplished. The voyage was not in its nature divisible, so as to give to the shipowner a claim to any aliquot part upon the performance of a certain portion of the voyage. The claim of the shipowner must therefore rest upon an implied contract to remunerate him for service performed, not according to the agreement, but a service from which the freighters have received a benefit; and whether, upon the whole, the shipowner has been overpaid or not will appear when the account is taken by the arbitrator on this principle between the parties" (1).

Shipowner must have been in a position to carry the goods on.

When the goods have been given up by the shipowner before reaching their destination, freight can only be claimed upon a new contract, either expressly made or to be inferred from the conduct of the parties. In order that such an inference may be drawn, the goods, or their proceeds, must have been accepted voluntarily, and in such a way as to show that the further carriage by the shipowner was intentionally dispensed with. If the merchant had either to accept the goods where they lay or abandon them, no promise to pay freight can be presumed from the fact of their being given up to him. The presumption cannot arise unless the shipowner was able and willing to carry on the goods to their destination, or might have become so within a reasonable time (2).

(1) See also *Bell* v. *Puller*, 2 Taunt. 285.

(2) See per Dr Lushington in *The Soblomsten*, L.R. 1 Ad. and Ec., p. 297; *Castel* v. *Treckman*, 1 Cab. and Ell. 276; *Atlantic Mutual Insurance Company* v. *Bird*, 2 Bos. 195. But *cf. O'Neill* v. *Armstrong* (1895), 2 Q.B., p. 77.

The case of *Cook* v. *Jennings*(1) was an action of covenant on a charter-party of affreightment, dated August 2, 1796, by which the plaintiff let his ship, the *Resolution*, to the defendant to freight from Liverpool to Wyburgh, and back to Liverpool, and agreed that the master should take on board a cargo of salt for Wyburgh, and after delivering the same there, should take on board a cargo of deals; in consideration of which the defendant agreed to pay to the plaintiff, "in full for the freight and hire of the ship for the said voyage, at and after the rate of £7 per standard hundred for deals delivered at Liverpool, etc., the freight to be paid one-fourth in cash on her arrival, and the remainder by an acceptance on London at four months' date." The plaintiff, in support of his action, alleged that the ship, after carrying the cargo of salt to Wyburgh, took on board there a cargo of deals, etc., and proceeded on her voyage for and towards Liverpool, etc.; and whilst the ship was so proceeding, and after she had performed a great part of her voyage, but before her arrival at Liverpool the ship was, by the force and violence of the winds and waves, wrecked and cast upon the shore, and thereby became incapable of proceeding any further on the voyage, by reason whereof it became necessary to put the cargo of deals on shore for the preservation thereof, "which said cargo, so unloaded, the defendant accepted and received into his hands and possession, and sold and disposed of the same to his own use, whereby he became liable to pay to the plaintiff a proportionable part of the said freight and hire of the ship for the carriage of the said cargo of deals, for such part of the voyage from Wyburgh to Liverpool as the ship performed"; which proportionable part amounted to the sum of £800, and for the recovery of that sum the action was brought. These facts were admitted to be true, and it was submitted that no part of the cargo was conveyed to Liverpool. The plaintiff did not pretend that he had offered to convey the deals thither, nor did the defendant assert

(1) 1797, 7 T.R. 381.

that he had required him to do so. The Court of King's Bench held that the plaintiff could recover nothing in the present action. Lord Kenyon said: "We are called upon to decide, in this action, according to the rules of law, on a contract between these parties, which was made in the most solemn manner by a deed under seal; though, indeed, I do not know that it would have made any difference if the question had arisen on a precise formal contract not under seal. By the terms of this agreement the defendant engaged to pay so much on delivery of the goods at Liverpool, one-fourth in cash on her arrival, and the remainder by an acceptance at four months. But the goods never arrived. Then at what time were those bills to be dated? We do not sit here to make, but to enforce, contracts; and the question put to us is, whether the freight is to be paid under this contract, though the ship never arrived, but was lost before her arrival at Liverpool? Upon which I cannot bring my mind to doubt. The case of *Luke* v. *Lyde* is very distinguishable from the present, that being the case of a general assumpsit for the freight of goods, in which Lord Mansfield states the marine law on this subject. But what has the case of an implied contract to do with an express contract? Lord Coke says, '*Expressum facit cessare tacitum.*' Here the parties are bound by a precise agreement. Then it is suggested that we ought not to give effect to this contract, because it is unreasonable; but we are to decide according to the contract of the parties. . . . Here the question is, whether or not he can enforce payment of the money under this contract, not having carried the goods to Liverpool, and the defendant having only undertaken to pay on their delivery at Liverpool? In answer to this action the defendant has a right to say, '*Non hæc in fœdera veni.*'"

Luke v. *Lyde* distinguished.

The other judges concurred in the same opinion. Mr Justice Grove cited the case of *Bright* v. *Cowper* (1) as a direct authority against the plaintiff. Lawrence, J., said: "I agree with the plaintiff's counsel, that whether

(1) 1611, 1 Brownlow 21.

the contract be by parol or under seal, the operation of the law on it is equally the same. When a ship is driven on shore, it is the duty of the master either to repair his ship, or to procure another; and having performed the voyage, he is then entitled to his freight; but he is not entitled to the whole freight unless he performs the whole voyage, except in cases where the owner of the goods prevents him; nor is he entitled *pro rata* unless under a new agreement. Perhaps the subsequent receipt of these goods by the defendant might have been evidence of a new contract between the parties; but here the plaintiff has resorted to the original agreement, under which the defendant only engaged to pay in the event of the ship's arrival at Liverpool. That event has not happened, and, therefore, the plaintiff cannot recover in this form of action."

Lord Tenterden's criticism of the mode of apportioning freight in *Luke* v. *Lyde*.

As we have seen in *Luke* v. *Lyde* (1), it was held that in case of a loss at sea, freight must be paid only in proportion to the goods saved, and the part of the voyage which has been performed. Abbott (afterwards Lord Tenterden) in the 5th edition of his work on Merchant Shipping, p. 321, says: "But it is obvious that such a mode of computation is very imperfect in its application to a journey by sea, in which the advance depends so much upon the state of the elements. It is obvious also that, considered with reference to the interests of the merchant, the measure of time or space cannot reasonably be admitted as a general rule; for if a ship arrive within one day's sail of the place of destination, and be driven or carried back from thence to the place of lading, the merchant cannot possibly be benefited by this ineffectual advance. If the ship put into a port short of the place of destination, the benefit of the merchant must depend upon many contingencies —upon the opportunity of sale there, and the means of further transport there. In the case of *Luke* v. *Lyde*, the carriage of goods from the port to which the ship was taken to the place of destination was higher than from the port of lading to that place. The rule was

14th edit. 726.

(1) 2 Burr. 882.

manifestly considered as applicable to the labour bestowed by the master, and not to the benefit received by the merchant; to the service performed, and not to the advantage derived from its performance. Whether the rule, so interpreted, be conformable to the principles of justice and equity, may well be questioned" (1).

In *Liddard* v. *Lopes* (2) the ship *Mayflower* was chartered at Hull to proceed from thence to Shields for a cargo of coals and sail therewith to Lisbon with the first convoy: the freight, at the rate of £45 per keel of coals, together with 5 per cent. primage in lieu of port charges and pilotage, to be paid on right delivery of the cargo. The ship took in her cargo and sailed to Portsmouth, when she joined convoy, and sailed therewith to Symington, where they were detained some time by contrary winds; at last the sailing instructions, which the master had received from the commodore, were recalled, and the ship returned to Spithead, the ports of Portugal being shut against British ships by the Portuguese Government. The French soon afterwards took possession of Portugal, and continued to occupy it until this action was brought. At the expiration of about two months from the ship's return to Spithead, the master formally required the merchants to land the coals; and gave them notice that, unless this was done, he would land and warehouse them at their expense and risk, and that he reserved to himself the right of proceeding at law for freight, demurrage, etc. The merchants replied: "If you land the coals, you will take the consequence: we do not consent, if we are to be called upon for freight and expenses." The cargo remained on board the ship nearly two months more, and was then landed by the master after another notice, to which it does not appear that any answer was returned. The coals were afterwards sold by consent of the parties without prejudice on either side, and produced a clear profit of £166, 18s. on the prime cost, after payment of the expense of unloading,

(1) See also *Hunter* v. *Prinsep*, 10 East. 378.
(2) 1809, 10 East. 526; Abbott, 5th Edit., p. 324; 14th Edit., p. 729.

landing, and warehousing. The question for the opinion of the Court was, Whether the plaintiff was entitled to recover a compensation for the part of the voyage which he had performed, and for the detention of his ship at Portsmouth? The action was in the same form as in the case of *Luke* v. *Lyde*, which was cited in support of the master's claim; but Lord Ellenborough said: "That was upon the ground of there having been an acceptance of the cargo by the owner in the course of the voyage, which showed his election to receive his goods at that place, instead of having them sent on to the place of their original destination; but the acceptance of the goods was the very substance of the new implied contract in *Luke* v. *Lyde*. But here there has been no agreement to accept the goods, but they were landed and sold without prejudice to either party. The case of *Luke* v. *Lyde* has been often pressed beyond its fair bearing, but the true sense of it has been explained by my brother Lawrence in *Cook* v. *Jennings*, and my brother Le Blanc in *Mulloy* v. *Backer*. Then what does this case amount to? The parties have entered into a special contract, by which freight is made payable in one event only, that of right delivery of the cargo according to the terms of the contract; and that event has not taken place. There has been no such delivery, and consequently the plaintiff is not entitled to recover. He should have provided in his contract for the emergency which has arisen."

It was said by Le Blanc, J., in *Mulloy* v. *Backer* (1): "Supposing this were a case for the freight of goods only, which have been stopped in the course of their voyage, and carried to another place, then, by assimilating it to the case of *Luke* v. *Lyde*, the plaintiff contends that he is entitled to recover *pro rata* for the freight, not on the ground of the original contract, but by reference to the marine law, on which the Courts have shaped a course to recover for a benefit to the defendant which made part of the original contract. That was the footing on which the case of *Luke* v. *Lyde*

(1) 5 East. 324.

was put; that though the master could not recover on the original contract which was not performed, yet that he might recover upon an implied assumpsit for a benefit already conferred on the defendant; which in that case was implied from the acceptance of the goods by the defendant at the port into which they were carried."

Effect on freight of abandoning voyage.

When the master relinquishes the attempt either to carry on the goods in his own ship, or to send them to their destination in another ship, he thereby wholly abandons any claim for freight in respect of them, unless it has been made payable in advance, or irrespective of delivery. Where freight is only payable on delivery, no part is earned until it is earned completely. So that whether the abandonment of the voyage be due to inability or prevention of the ship, or to the necessity of selling the goods, either to raise funds for the ship's repairs or in their owner's interest, the shipowner loses the whole freight. On the other hand, if the cargo be accepted at the port of refuge under an agreement that delivery shall be treated as a performance by the shipowner of his contract, or if the owner of the goods, by any act or default, prevents the shipowner from carrying them on to their destination, the whole of the freight becomes at once payable (1).

Prevention of voyage by causes beyond owner's control.

In *Metcalfe* v. *The Britannia Ironworks Company* (2) a cargo of railway bars was shipped under a charter-party to be carried from a port in England to Taganrog, in the Sea of Azof, or so near thereto as the ship could safely get, freight to be paid in London against certificate of right delivery of cargo. On the arrival of the ship, on the 17th December, at Kertch, which was as near as he could then get to Taganrog, the captain found the sea blocked with ice till the ensuing spring; and he proceeded to discharge the cargo, notwithstanding the opposition of the charterer's agent. By the bill of lading the cargo was deliverable at Taganrog to a Russian railway company, "freight and

(1) *Christy* v. *Row*, 1 Taunt. 300; *Cargo ex Galam*, 33 L.J. Ad. 97; *The Soblomsten*, L.R. 1 A. and E., p. 297. See *Blasco* v. *Fletcher*, 32 L.J. C.P. 284.

(2) 1877, 2 Q.B.D. 423.

other conditions as per charter-party." As no bill of lading was produced at Kertch, the captain placed the cargo in charge of the custom-house authorities, and they on the 27th of December delivered it to the agent of the railway company on his producing written authority from the company, together with copies of the charter-party and bill of lading, notwithstanding the captain's claim to retain it until the freight was paid. The agent of the company gave a written acknowledgment that he had received the cargo on the power of the charter-party and bill of lading passed to him by the railway company. The ship then sailed from Kertch. The shipowner having sued the charterers for freight, it was held by the Court of Appeal, affirming the judgment of the Queen's Bench Division, first, that the plaintiff was not entitled to full freight, as the delivery at Kertch was not a delivery within the charter-party; and secondly, that the plaintiff was not entitled to freight *pro rata*, as no new contract for such freight had been made. Lord Esher said (1): "It appears to me that the charterers here are not liable, and that even if the consignees had waived the full performance, that would not bind the charterers and make them liable."

Metcalfe v. *Britannia.*

Mr Justice Quain, in the Court below, said: "In fact, the present case is one in which the master, by an unfortunate mistake, has left the goods at an intermediate port, and refused to carry them on to their destination; and it was not till after such refusal that the agent of the consignees took possession of them as the holders of the bills of lading. They had no other course to pursue, if they wished to preserve their own property. It is said, however, that the master claimed a lien on the cargo for freight, and protested against the agent of the consignees taking possession; and that by reason of the consignees so taking possession, he and his owners were prevented from sending a ship and carrying on the cargo at the opening of the navigation. But the master had no lien for freight, for he had

(1) 2 Q.B.D. 431.

neither earned any freight nor was he going on to earn it; and he having declared that he discharged the cargo at Kertch, and did not intend to carry it further, the parties had a right to take him at his word, and to act on that declaration, and treat it as a breach of the charter-party, and to take possession of the cargo which the master had so abandoned. See on this last point the *Danube Railway Company* v. *Xenos*(1), *Frost* v. *Knight*(2), and the cases there cited."

His lordship then said the Court was entirely ignorant whether, in the result, the freighters ever derived any benefit or advantage whatever from the carriage of their cargo to Kertch, and added(3): "Had it appeared from the case before us that the defendants in the present case, notwithstanding the master's failure to complete his contract, had, in the result, derived benefit and advantage from the carriage of the cargo to Kertch, either in the price received for the goods or otherwise, a question might have arisen whether we might not now be called upon to administer in favour of a shipowner who had carried the cargo to within 30 miles(4) of its destination, and of which part performance the defendants had the benefit—some of that 'larger equity' alluded to by Lord Tenterden, as exercised by Courts of Admiralty in similar cases." But as the point was not expressly raised by the case, Mr Justice Quain added they gave no opinion on the subject. In the Court of Appeal, Lord Bramwell also said that the claim to freight *pro rata* could only be made under a new contract. And as to the argument that the consignees had taken the cargo voluntarily, his lordship said: "No doubt they did so in one sense, just as a man turned out of a hackney cab, instead of being carried to the end of his journey, would probably walk away, though, of course, he might sit down on a doorstep and wait for the cabman to carry him on. No doubt the consignees might have left the goods

Where shipowner has carried cargo nearly to destination.

(1) 1861, 11 C.B. N.S. 152. (2) 1872, L.R. 7 Ex. 111.

(3) 1 Q.B.D., at p. 635. But see *The Friends*.

(4) This was a mistake for 300 miles, see the case in the Court of Appeal, 2 Q.B.D. 423.

there, but they took them away because they could not help it."

Under a charter-party providing that the vessel should proceed to Tonapsi and Taganrog, or "so near thereunto as she could safely get," and there deliver cargo, it was held, these ports being under blockade, that it was not a fulfilment of the contract for the vessel to discharge at Constantinople, even though that might be a reasonable course to adopt. It was held, too, the charterers having paid the freight under protest at Constantinople, that the charterers were entitled to recover it back, as, on these facts, there was no implied contract to pay freight *pro rata* (1). Mr Justice Stephen held that there was no question of a new contract, each party having stood out for their strictly legal rights.

Where a ship and cargo are brought into port by salvors, and a suit is instituted in the High Court of Admiralty to recover salvage reward, that Court will, on the application of the salvors, acting with the assent of the owners of the cargo, order a sale of the cargo to prevent deterioration from damage done, although the shipowner, desirous of carrying on the cargo so as to earn freight, opposes the sale, and offers to give substantial bail for both ship and cargo; but such sale will be ordered subject to all questions of right to freight. Where a ship, injured by collision without fault of her master and crew, is abandoned by them, and is afterwards taken possession of and brought in safety into port by salvors, who institute a suit against ship and cargo, the shipowner, having by the abandonment put an end to his contract, loses all claim to have the cargo put into his possession to enable him to carry it on and so earn his freight, and all claim to be paid full freight out of the proceeds of the cargo if sold by order of the Court. Nor can the shipowner have any claim for *pro rata* freight unless there be a new contract, express or implied, to pay the same; and if the shipowner refuses to consent to a sale of the cargo by the

If ship abandoned, freighter may treat contract as at an end.

(1) *Castel* v. *Treckman*, 1884, 1 Cab. and Ell. 276.

Court when applied for by the salvors and owner of cargo, unless he be paid full freight, no such contract can be implied (1).

Cargo owner may treat contract as at end, where ship abandoned during voyage.

By the abandonment of a ship by its crew during a voyage, without any intention to retake possession, a right is given to the owner of cargo on board to treat the contract of affreightment as at an end (2). Lord Esher said: "It has been urged that the abandonment of a ship puts an end to the contract of affreightment. I am not prepared to say it does. Suppose a wrongful abandonment without being occasioned by the perils of the sea: it is clear that in that case the owner of the cargo might sue the shipowner for his breach of contract, so that it cannot be said that it puts an end to the contract of affreightment. It is sufficient, I think, for the determination of the present case, to say that by an abandonment of a ship without any intention to retake possession of it, the shipowner has, so far as he can, abandoned the contract, so as to allow the other party to it, the cargo owner, to treat it as abandoned." His lordship, however, further qualified what he had said by stating the facts of the case, which showed the ship had been abandoned, brought home and arrested by salvors, and that the shipowners had only offered to carry the cargo to its destination after its owners had demanded it should be given up to them. On these acts the decision rests, for, his lordship added: "We do not decide what would have been the result if, after the ship had been brought in as it was by the salvors, and before the cargo owners had come in and exercised their right to the cargo, the shipowners had given bail for the ship and cargo, and had carried the cargo on."

In *Guthrie* v. *North China Insurance Company* (3) a ship was chartered for a voyage from Chittagong with a cargo of jute in bales for delivery at Dundee. The ship, cargo, and chartered freight were insured. When about 50 miles from Dundee, the ship went ashore, and the master and the crew, in order to save their lives,

(1) *The Kathleen*, 1874, 31 L.T. 204.
(2) *The Cito*, 1881, 7 P.D. 5. (3) 1902, 7 Com. Cas. 130.

abandoned her, but it was not proved that they at that time had no intention of returning. Notices of abandonment were given to underwriters on all three interests, and were all refused in the first instance, but eventually the underwriters on ship and cargo paid a total loss. The underwriters on all three interests instructed the Salvage Association independently to protect their interests, and the Association entered into a salvage contract with a salvage company. A large quantity of the jute was salved, partly in bulk and partly in bales, and was carried to Dundee, where it was sold on behalf of whom it might concern. The Court of Appeal held (*a*) that upon the facts there was nothing to show that the shipowners, by any act or omission on their part, prevented the transhipment of the goods and their delivery under the contract of affreightment, inasmuch as the cargo owners, by their underwriters, dealt with the cargo at a time when the shipowners, without fault of theirs, had not resumed possession or control of the cargo; (*b*) that the adventure was determined, if not by the action of the cargo owners alone, at all events by the common action of all parties interested through their underwriters; (*c*) that the jute having been carried to Dundee under the salvage contract, and not under the charter-party, the chartered freight had not been earned, and the underwriters on chartered freight were liable to pay a total loss without any deduction in respect of actual or possible salvage.

Where salving ship takes crew off, no abandonment.

It was held in the case of *The Leptir* (1) that, where a salving ship takes a crew off a vessel in distress and puts men on board of her, refusing to allow her own crew to return, and the two vessels are in company navigated into port, there is no such abandonment of the ship as to put an end to the contract of carriage, and consequently there will be freight due upon the consignees requiring delivery of the cargo, such freight being *pro rata*, assuming the port not to be the port to which the cargo ought to have been taken under the contract of carriage. Sir Charles Butt said, during the

(1) 1885, 5 Asp. M.C. 411.

argument, he did not intend to carry *The Cito* (1) a step further than it had gone; and his lordship held that, on the facts before him, there had been no abandonment, as the crew of the *Leptir* had gone on board a ship which had put part of her crew on board the *Leptir* and stood by her for the rest of the voyage. His lordship also said that, having regard to the fact that the salving ship was willing to assist, an abandonment would have been so improper that the owners of the cargo would have been entitled to damages against the shipowner for the wrongful act of his crew.

Subsequent recovery of vessel from salvors.

If a ship is abandoned by her master and crew during a voyage, and the cargo owner exercises his right of treating the abandonment as a determination of the contract of affreightment, the subsequent recovery of the vessel by the shipowner from salvors at the port of discharge will not revive the contract, and the owner of the cargo will be entitled to have it returned to him without payment of freight. In *The Arno* (2), the ship, after being abandoned by the master and crew, was picked up by the steamship *Merrimæ*. The owner of the *Arno*, hearing of this, obtained an undertaking from the owners of the *Merrimæ* that they would hold the *Arno* for him on her arrival at a port in the United Kingdom. He also sent out a tug to meet the *Arno*; and on her arrival at Liverpool, which was her destination, he got possession of her from the salvors. Still, it was held by the Court of Appeal that, as the cargo owners had given notice before the ship's arrival that they treated the contract as ended, they were entitled to have the cargo without paying any freight. The question whether the shipowners, if they regained possession before the cargo owners elected to treat the contract as ended, could claim to resume the contract without any fresh agreement, was regarded as still open.

Involuntary abandonment does not terminate contract.

In *The Eliza Lines* (3) it was held by the Circuit Court of Appeals of the United States that the involuntary abandonment of a vessel by her master and

(1) 1881, 7 P.D. 5. (2) 72 L.T. 621.
(3) 61 Feb. Rep. 308; 114 Fed. Rep. 307.

crew under stress of weather, without any actual intention to renounce the contract of affreightment between the ship and cargo owners, does not terminate such contract; but on the bringing of the ship into port by salvors in a condition to resume her voyage without unreasonable delay, the master is entitled, within a reasonable time, to reclaim the vessel and cargo, and on indemnity to the salvors to take the cargo to the stipulated port of destination. Where a vessel, abandoned at sea under circumstances which rendered such abandonment excusable, so that it did not operate to terminate the contract of affreightment, is brought into port by salvors, but by the action of the cargo owners the resumption of the voyage is prevented, the shipowner is entitled to be compensated for his loss of freight on principles of equity; but under such principles his damages cannot go beyond compensation, and he is not entitled to recover the gross freight he would have earned under the contract, but only the estimated net freight, and from that should be deducted the net amount the ship earned, or should reasonably have earned, during the time it would have taken her to complete the voyage(1). After commenting upon the English decisions and text-books as presenting an "inharmonious and unsettled" result, the Court said: "We feel compelled to hold that the circumstance of derelict, followed by the further circumstance that the derelict comes into the hands of salvors, and from their hands into the Admiralty Court, is only a particular phase, not differing in essentials from other phases of the incidents of the perils of navigation, from which the ship is bound to relieve the cargo, so far as circumstances will permit, and which will not deprive the vessel of its freight if prepared to earn it" (2).

Shipowner not entitled to any freight till ship breaks ground.

As the right to freight does not commence until the ship has broken ground and begun the voyage, no partial payment can be claimed for goods laden on board, if, even without the fault of the master, the ship is prevented from actually setting forth on the voyage.

(1) 114 Fed. Rep. 307. (2) 61 Fed. Rep., p. 330.

And therefore, in the case of a ship which took on board a cargo in Salt River in Jamaica, at a very great expense to the owners (who, by the usage of the West India trade, fetch the cargoes from the shore at their expense), and which actually cleared out for the voyage, but, while waiting for convoy, was cut out of the river by two French privateers ; and being afterwards retaken, was carried into Port Royal, where the cargo was sold under an order of the Court of Admiralty, and the proceeds thereof, with the deduction of salvage, paid to the merchants : it was decided that nothing could be claimed of the merchants, although each of the judges expressly recognised the rule of the marine law as to the partition of freight *pro rata itineris* ; the Court holding that in this case there had been no commencement of the voyage, and therefore no freight could be due ; and that, as the freight was, by the contract, the only remuneration of all the services performed by the owners, they were not entitled to any recompense for the expense of taking the goods on board (1).

Right to freight where part only of round voyage performed depends on terms of particular charter-party.

Where a ship is hired by a charter-party to sail from one port to another, and from thence back to the first, as, for instance, from London to Leghorn, and back from thence to London, at a certain sum to be paid for every month or other period of the duration of the employment, if the whole is one entire voyage, and the ship sail in safety to Leghorn, and there deliver the goods of the merchant, and take others on board to be brought to London, but happen to be lost in her return thither, nothing is due for freight, although the merchant has had the benefit of the voyage to Leghorn ; but if the outward and homeward voyage are distinct, freight will be due for the proportion of the time employed in the outward voyage (2).

(1) *Curling* v. *Long* (1797), 1 Bos. and Pul. 634.

(2) This proposition is laid down by Malloy, book 2, ch. 4, s. 9. Cited by Abbott, 5th Edit., 332, 14th Edit., 743; Malyne, p. 98. See *Mackrell* v. *Simond & Hankey*, 2 Chitt. 666; *Byrne* v. *Pattinson* in K.B. Trinity Term, 37 Geo. 3 (1796); Abbott, 5th Edit., p. 336, 14th Edit., 745; *Smith* v. *Wilson*, 6 M. and S. 78, 8 East. 437 ; *Gibson* v. *Mendes*, 2 B. and Ald. 17.

CHAPTER III

MANNER OF CALCULATING FREIGHT

Where amount of freight not mentioned.

THE bill of lading or the charter-party generally states the rate at which the freight is to be paid, but if it does not, and the contract shows that freight is to be paid, it must be calculated at the ordinary rate ruling at the time the shipment was made (1).

Freight to be paid according to net weight.

Goods shipped from abroad, and consigned to a merchant in this country, are to be paid for (upon a demand for freight) according to their net weight, and not according to the weights expressed in the bill of lading, unless there is a special contract so to pay for them (2).

Lowest to be taken.

In the absence of an agreement, or of a uniform custom of trade, to the contrary, the rule is that, if the weights or measurements at the loading port and the port of delivery differ, the *lowest* weight or measurement is to be taken in calculating the freight. So that if the cargo has swelled on the voyage, the freight is payable on the quantity as shipped; while if it has wasted, as by drainage or evaporation, the quantity to be taken is that on delivery (3).

Expansion of goods during voyage.

In *Gibson* v. *Sturge* (4) the bill of lading represented that 2664 quarters of wheat had been shipped. During the voyage, however, some of the cargo heated and swelled, so that the quantity delivered measured 2785

(1) *Gumm* v. *Tyrie*, 33 L.J. Q.B. 97.

(2) *Geraldes* v. *Donison*, Holt, 346.

(3) See per Willes, J., in *Dakin* v. *Oxley*, 33 L.J. C.P. 119, where he refers to Continental law.

(4) 1855, 24 L.J. Ex. 121.

quarters. The shipowner claimed freight on the quantity delivered, but the Court of Exchequer held that the freight must be reckoned on the quantity shipped. Lord Chief Baron Pollock said: "From the terms of the bill of lading (1), I infer that the freight was to be paid for the commodity shipped, carried, and delivered, and that all those must concur to create a title to freight under the bill of lading. If shipped and carried but not delivered, freight would not be payable; and, I think, if delivered, but not shipped, freight would not be payable: and this agrees with the decisions, very few in number, and none of them precisely in point on this subject, which are to be found in the books on the subject of increase or decrease during the voyage of an article to be carried. I agree that the bulk or weight, as appearing at the port of destination, may be *prima facie* the criterion of the freight to be paid; but when it is proved and found by the jury that that test is fallacious and untrue, and that the real quantity shipped was a different and a smaller quantity, then, I think, the freight ought to be calculated upon the true quantity shipped, and, in my judgment, the captain's ignorance of the true quantity as expressed in the bill of lading, cannot entitle him to charge freight according to a false estimate. Whether the actual quantity be stated and admitted in the bill of lading, or the contents be stated to be unknown, appears to me to make no difference as to the principle which ought to govern our decision. But it does appear to me to be contrary to the principles of natural justice that a shipowner should acquire a right to demand more freight, and the owner of the goods become liable to pay more freight, in consequence of a circumstance which is an injury to the goods, and which has occurred to them while they were in the care, custody, and keeping of the shipowner, or those who represent him, and over the causes of which the owner of the goods has no

(1) This instrument made the cargo deliverable to the consignees, "or to their assigns, paying freight for the said goods." The words "quantity or quality unknown" were added.

control, but some of the possible causes of which are considerably or entirely under the control of the captain and the crew. I apprehend no one can entertain any doubt that, if the water which has caused the apparent increase were capable of separation from the wheat originally shipped, the defendants would be entitled to reject it, and to accept and pay freight for the wheat freed from that injurious addition." Martin, B., dissented, mainly on the ground that a rule which required the measurement to be taken at the port of loading would be highly inconvenient, and might enable the consignees of cargo to raise questions for the purpose of delaying freight. He said: "In my opinion, therefore, in the absence of contract upon the subject, and considering what is most just and reasonable, what is most analogous to cases of a similar kind, and what is the most convenient practical rule upon the subject, and the most beneficial to all parties interested, the measurement at the port of delivery affords a test for the ascertainment of freight preferable to that of measurement at the port of loading."

In *Buckle* v. *Knoop* (1), by a charter-party made between the plaintiff and the defendants, it was agreed that the plaintiff's ship should sail to Bombay and there load from the defendants a full cargo of cotton, and proceed with it to Liverpool and deliver the same on being paid freight at the rate of "75s. per ton of 50 cubic feet delivered." The ship received at Bombay, and carried to Liverpool, a full cargo of cotton; the cargo was packed at Bombay, as is customary, in compressed bales, and expanded greatly on being unloaded at Liverpool. It was held by the Exchequer Chamber that the freight was payable on the measurement of the goods when shipped, and not when delivered. Blackburn, J., said: "What is a full cargo must be settled at the time of shipment, and the measurement must be according to the state of facts in which the cargo is then a full and complete one. It was rightly said by the Court of Exchequer in *Gibson*

Measurement of goods when shipped, and not when delivered.

(1) 1867, L.R. 2 Ex. 333.

v. *Sturge* (1) that freight can only be claimed on what is shipped, carried, and delivered. If the parties for any reason choose to deviate from that rule, they may do so, and may make freight payable on the measurement of the cargo when unloaded, or on the cargo as shipped, and whether delivered or not, in which case, though a portion is lost, freight is still payable on it. But if any such variation from usage is intended, the parties should use apt words to express it."

Net weight delivered.

But in *Coulthurst* v. *Sweet* (2), bark was shipped (green) at Penang, under a bill of lading describing it to be of a certain weight, and making it deliverable to the consignees in London on payment of freight at a certain rate per ton of 20 cwt. "net weight delivered." On arrival in London, the agent appointed by the managing owner demanded freight *on the weight mentioned in the bill of lading*, and refused to deliver the bark unless the consignees would pay according to that weight, or (under an alleged custom) incur the expense of weighing over the ship's side or at a legal quay. The consignees paid the money under protest, and brought an action against the defendant, one of the joint owners, to recover back the excess. The jury having negatived the alleged custom, it was held that excess freight paid under protest upon the shipping weight stated in the bill of lading, in order to obtain possession of the goods, might be recovered back (3). In that case, however, the bill of lading adopted the ordinary rule, for the goods (green bark) would naturally be lighter on delivery than on shipment.

In *Shand* v. *Grant* cotton was shipped at Madras, consigned to London for the plaintiffs, merchants residing at Liverpool. The bills of lading expressed the freight to be "at the rate of £2, 5s. per ton of 50 cubic feet as per margin." The margin contained a note of the measurement of the cotton and of the amount of freight calculated accordingly. On the arrival of the ship the cotton was landed at a wharf in London, and the

(1) 10 Ex. 622. (2) 1866, L.R. 1 C.P. 649.
(3) *Cf. Shand* v. *Grant*, 9 L.T. 390.

plaintiffs' brokers sent copies of the bills of lading to the wharfinger and also to the plaintiffs at Liverpool. The wharfinger in the ordinary course of business measured the cotton and sent a note of the measurement to the defendants, who were the ship's brokers, one of them being the sole owner of the ship. The defendants thereupon made out a freight note, calculating the freight according to the London measurement, which was larger than the Madras measurement, and forwarded it to the plaintiffs' brokers, who paid the amount and were credited therewith by the plaintiffs, their principals, the latter having the bills of lading in their possession at the time. After the lapse of nearly two years the plaintiffs settled their accounts with their agents at Madras and the mistake was discovered. The plaintiffs then sued the defendants for the amount of freight overpaid. The defendants had in the meantime settled the ship's account for the voyage with the owner. There was perfect *bona fides* on both sides. It was held that the money having been paid by the plaintiffs under a mistake, they were entitled to recover it back from the owner of the ship, but not from the defendants, the ship's brokers.

Quantity and quality unknown.

To meet the effect of the decision of *Gibson* v. *Sturge*, shipowners and shippers are in the habit of inserting express provisions on the subject. In *Tully* v. *Terry* (1) the *Avoca* was chartered to ship a cargo of grain at Ibraila and deliver at a port in the United Kingdom on being paid freight, "7s. per imperial quarter delivered," and in event of any part of the cargo being delivered in a damaged condition, the freight should be payable "on the invoice quantity taken on board as per bill of lading, or half freight on the damaged or heated portion, at the captain's option." The cargo was shipped under a bill of lading describing the quantity as 1021 kilos., and the captain, before signing the bill of lading, added a memorandum, "quantity and quality unknown." The captain, on his arrival at a port in England, having experienced

(1) 1873, 29 L.T. 36.

bad weather, gave notice to the indorsee of the bill of lading that he claimed to exercise the option given to him by the charter-party, and requested to be paid freight on the invoice quantity. It was held that the addition of the memorandum to the bill of lading, "quantity and quality unknown," did not take away the captain's right to be paid freight on the invoice quantity taken on board.

Goods destroyed by fire before voyage begins.

By a charter-party the defendants contracted, except prevented by fire, to load the plaintiff's ship with a full cargo of jute at £1, 17s. 6d. per ton, but the captain was to sign bills of lading at any rate of freight without prejudice to the charter-party or to the owner's lien, provided the bill of lading freight in the aggregate fully covered the freight under the charter-party. The defendants had shipped 7545 bales of jute, when a fire broke out and destroyed 5458 of the bales and delayed the sailing of the ship. The freight specified in the bills of lading for the goods burnt was £1, 5s. per ton. The defendants then refused to ship any more goods, and the plaintiffs filled the ship with cargo, some at £1, 5s. per ton and some at a lower rate. The plaintiffs having brought this action to recover damages for breach of the charter-party by the defendants in not having loaded a full cargo, it was held by the Court of Appeal (affirming the decision of Pollock, B.) that with regard to the bales burnt each party had *pro tanto* fulfilled their respective obligations under the charter-party, and the defendants were under no liability to pay freight for the bales burnt, nor bound or entitled to reload cargo to take their place; and that the freight received by the plaintiffs for the cargo shipped by them in the space formerly occupied by the burnt bales ought not to go in reduction of any damages payable by the defendants. It was further held that the fire only absolved the defendants from payment of so much of the freight as would have been actually received for the goods burnt, viz., £1, 5s. per ton (1).

Usages as to measurement.

The rule as to measurement may be controlled by an

(1) *Aitken, Lilburn & Co.* v. *Ernsthausen & Co.*, 1894, 70 L.T. 822.

established uniform usage in the particular trade. In a charter-party to pay so much a ton for cotton shipped at Bombay for London, to be calculated at 50 cubic feet per ton, nothing was said as to the place where the measurement was to be made, it was held that the defendant might call witnesses to show a usage at the port of Bombay of packing cotton by means of a screw, so as to compress a greater quantity into a less space. It was also held, it was competent to the plaintiff to produce witnesses in reply, for the purpose of proving such facts as would show the alleged usage to be unreasonable, and that it was not acted upon by the parties; and that such evidence need not be given at first as a part of the plaintiff's direct case (1).

It is said that in the West India trade the freight of sugar and molasses is regulated by the weight of the casks at the port of delivery here, which in fact is, in every instance, less than the weight at the time of the shipment, and therefore the loss of freight occasioned by the leakage necessarily falls upon the owners of the ship, by the nature of the contract (2).

A charter-party provided that a vessel should load a full cargo of Jarrah wood for the United Kingdom, freight being payable at the rate of 35s. per load of 50 cubic feet delivered. "Cargo to consist of 9-inch by 3-inch planks, of reasonable lengths, such as could go down ship's present hatchways." The cargo consisted of planks exceeding 9 inch by 3 inch by an average of about $\frac{1}{8}$ inch. By a custom of the hardwood timber trade, in measuring cross dimensions, fractions of quarter of an inch are disregarded. It was held that the freight was payable upon the number of loads ascertained by measuring the cargo in the customary manner, and assuming that there had been a breach of the obligation to load planks 9 inch by 3 inch, the damages were measured by the difference, if any, in freight, which must be ascertained by measuring in the customary manner. It would seem that the expression,

(1) *Bottomley* v. *Forbes*, 1838, 8 L.J. C.P. 85.
(2) Abbot, 5th Edit., p. 297; 14th Edit., p. 705.

"planks 9 inch by 3 inch," meant planks of those measurements, when measured in the customary manner (1).

In *Nielsen* v. *Neame* (2) timber was consigned to the Surrey Commercial Docks under a charter-party by which freight was made payable "for deals and for battens per St Petersburg standard hundred £2, 5s." It was held that freight was payable only upon the number of St Petersburg standard hundreds, as ascertained by the customary mode of measurement adopted by the dock company for timber cargoes (3).

By a charter-party it was agreed that "a ship should load a cargo, and proceed to a port in Great Britain and deliver the same on being paid freight at and after the rate of 35s. per 180 English cubic feet taken on board, as per Gothenburg custom." The Court of Appeal held, that the freight was to be ascertained by measuring the cargo according to the method used at Gothenburg, and not according to the method used at the port of discharge (4). "The Court must adopt a construction which has a meaning with reference to the facts of the case. . . . It has been proved that there is a particular custom or method of measuring props in use at Gothenburg. There is no other custom to which the words in the charter-party can apply but that. It was suggested, on the part of the respondents, that the custom mentioned had reference to the manner of loading the vessel, but there is no evidence at all of any such custom" (5).

Bill of lading quantity not conclusive unless so agreed.

In *Moller* v. *Living* (6) the bill of lading of a cargo shipped at Dantzic expressed it to be 100 lasts in 2092 bags. The consignee had purchased it for that quantity, English measure; but it did not amount to that quantity by the Dantzic measure, which is larger. It was held that the master was entitled to freight according to the measure in the bill of lading, and

(1) *Young* v. *Canning Jarrah Timber Company*, 1889, 4 Com. Cas. 96.
(2) 1884, 1 Cab. and E. 288.
(3) See *Buckle* v. *Knoop*, 1867, L.R. 2 Ex. 333.
(4) *The Skandinav*, 1881, 51 L.J. Adm., 93.
(5) Per Jessel, M.R., 51 L.J. Adm., p. 94. (6) 1811, 4 Taunt. 101.

exceeding the freight computed by Dantzic measure. Lord Mansfield, in delivering the judgment of the Court, said: "We are of opinion that we cannot distinguish this contract from the usual case of written contracts where there is no ambiguity, and that on this contract the captain has agreed to carry, and the freighter has agreed to pay for, the quantity mentioned in the contract, and that is, 100 lasts; that they are bound by the words of this bill of lading as they would be by any other written instrument, and that it is irrelevant for them to inquire whether it is Dantzic measure or English measure: the instrument describes not merely 100 lasts, but 100 lasts very specifically mentioned as contained in so many bags; and I am of opinion that if evidence had been offered, as in truth it was not, for showing what was the real quantity, it ought not to have been received."

Master by signing bills of lading only binds the owner to deliver amount actually put on board.

The master of a ship, by signing bills of lading, does not bind the owner to deliver the amount of goods specified in the bills, but the amount which has been actually put on board (1). A shipowner is not estopped by the signature of the bill of lading by the master from showing that the goods or some of them were never actually put on board (2). By a charter-party for the conveyance of a cargo of coal from Cardiff to Buenos Ayres, it was stipulated that the master should "sign bills of lading for the cargo put on board as presented to him by the charterers, without prejudice to the terms of the charter-party." On arrival at the port of discharge, it was found that the coal delivered to the consignees was less by thirty-two tons than the quantity mentioned in the bills of lading, and the owners were called upon to pay, and paid, the difference of value to the consignees. In an action by the owners against the charterers to recover the amount so paid, it was held that, inasmuch as the owners were under no legal liability, either at common law or under the Bills of Lading Act, to pay for such deficiency, the action was

(1) *M'Lean* v. *Fleming*, 1871, L.R. 2 H.L. (Sc.) 128.
(2) *Brown* v. *Powell Coal Company*, 1875, L.R. 10 C.P. 562.

not maintainable. Lord Esher, M.R., said(1): "The alleged ground of action is that the charterers presented to the master for signature bills of lading which described the weight of coal put on board as being greatly in excess of that which was actually loaded. No fraud or knowledge on the part of the defendants is alleged. The ground of the action is the breach of a supposed warranty that they would not in the bill of lading misrepresent the quantity delivered. Now, the mere breach of warranty would lead only to nominal damages. But the plaintiffs insist that they are entitled to substantial damages in this case, because, by the terms of the bills of lading, they would be bound to deliver to the consignees the weight of coal specified therein, and would be, or had been, forced to pay damages to the consignees for not having delivered such full weight. Now, there is no express warranty: the question is whether there is an implied one. It is suggested there is, because by the terms of the charter-party it must have been obvious to both parties that the liability of the shipowners to the consignees would be regulated by the bills of lading. No such warranty, however, can arise as between the defendants and the plaintiffs, the shipowners, inasmuch as the ordinary law would oblige the master to signs bills of lading; and, if he signs for a greater quantity of goods than is put on board, *M'Lean* v. *Fleming*(2) shows that the owners are not bound to deliver more than the real quantity shipped. But it is suggested that the obligation of the owners might be more extensive abroad—that the consignees there might have different rights from consignees here. The rights of the consignees, however, must depend upon the bill of lading. That is a contract made in this country, and by the comity of nations its construction would be regulated according to the law of this country. . . . I was at first struck by the suggestion that the absence of liability on the part of the shipowner is in ordinary cases founded upon the absence of authority of the master to sign bills of lading without requiring the coals

(1) 1875, L.R. 10 C.P., p. 566. (2) L.R. 2 H.L. Sc. 128.

to be weighed—to sign according to the weights presented to him. But the charter-party freight, or the obligation of the owners to deliver, does not depend upon the assertion contained in the bill of lading. It occurred to me that the Bills of Lading Act might have made some difference in this respect: it provides in section 3 that 'every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same'; and, inasmuch as the shipowners here authorised the master to sign an unusual bill of lading, it might be considered that the signature of the master was their signature. . . . But the authority given to the master here was, not to sign the name of his owners, but to sign for himself, though to sign an unusual bill of lading. The statute means, I think, the signature of the name of the person who is intended to be bound. It seems to me, therefore, that although the plaintiffs authorised the master to sign these bills of lading, there is no estoppel as between them and the consignees either at common law or by statute, and no binding of them by the bill of lading; and that they were not bound to deliver to the consignees a greater amount of cargo than they actually received on board."

If, however, the freight is expressly to be paid upon the quantity as stated in the bill of lading, it is not open to either party, in the absence of fraud, to vary the amount by showing that the statement was not correct (1).

The whole freight named in the bill of lading is payable to the shipowner carrying under it, although a less quantity of goods than the quantity named in the bill of lading be delivered, if the quantity delivered be no less than the quantity received by the shipowner. By French law the whole freight is payable, whether the whole quantity named in the bill of lading be carried or not; and therefore, in the case of a bill of lading

French law as to amount payable.

(1) *Tully* v. *Terry*, L.R. 8 C.P. 679.

executed in France, it is immaterial whether or not the shipowner received the whole quantity named in the bill of lading. It would seem that, by the Bill of Lading Act 1855, s. 3, that the bill of lading is conclusive evidence as to quantity, not to weight (1).

Representation as to ship's carrying capacity.

It is now settled that a statement in a charter-party that a ship is of a specified register tonnage is a matter of description, and is not a warranty that she is of that exact tonnage. If the misdescription is very gross, it may be evidence of fraud, or possibly the charterer may refuse to load the vessel on the ground that she is not the thing he bargained to have; but if the description is practically complied with, the charterer is bound to accept her. Thus, where an intending charterer was informed by the agents of a ship that they were not quite sure of her size, but they believed her to be of not more than 200 tons burden, and he agreed to take her without ascertaining her tonnage, she being described in the charter-party as "of the measurement of 180 to 200 tons or thereabouts," it was held he could not refuse to load her when he found that she was, in fact, of the measurement of 258 tons (2).

What is a representation?

Williams, J., in *Behn* v. *Burness* (3) says: "Properly speaking, a representation is a statement or assertion made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. Although it is sometimes contained in a written instrument, it is not an integral part of the contract, and, consequently, the contract is not broken, although the representation proves to be untrue, nor (with the exception of the case of policies of insurance, at all events, marine policies, which stand upon a peculiar anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever, unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, or with a reckless ignorance

(1) *Blanchet* v. *Powell's Llantivit Collieries Company*, 1874, 30 L.T. 28.
(2) *Windle* v. *Barker* (1856), 25 L.J. Q.B. 349.
(3) 1863, 32 L.J. Q.B. 205.

whether it was true or untrue: see *Elliott* v. *Von Glehn* (1) and *Wheelton* v. *Hardisty* (2). If this be so, it is difficult to understand the distinction which is to be found in some of the treatises, and is in some degree, perhaps, sanctioned by judicial authority—see *Barker* v. *Windle* (3)—that a representation, if it differs from the truth to an unreasonable extent, may affect the validity of the contract. Where, indeed, a representation is so gross as to amount to sufficient evidence of fraud, it is obvious that the contract would on that ground be voidable. Although representations are not usually contained in the written instrument of contract, yet they sometimes are, but it is plain that their insertion therein cannot alter their nature. A question, however, may arise, whether a descriptive statement in a written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of construction which the Court, and not the jury, must determine. If the Court should come to the conclusion that such a statement by one party was intended to be a substantive part of this contract, and not a mere representation, the often-discussed question may of course be raised whether this part of the contract is a condition precedent or only an independent agreement, a breach of which will not justify a repudiation of the contract, but can only be a cause of action for compensation in damages. In the construction of charter-parties this question has been often raised with reference to stipulations that some future things should be done or shall happen, and has given rise to many distinctions. Thus, a statement that a vessel is to sail or be ready to receive a cargo on or before a given day, has been held to be a condition: see *Glaholm* v. *Hays* (4), *Oliver* v. *Fielden* (5), *Croockewit* v. *Fletcher* (6), and *Seeger* v. *Duthie* (7); while a stipulation that she shall sail with all convenient speed, or within a reasonable time, has

(1) 13 Q.B. 632. (2) 8 El. and B. 232.
(3) 6 El. and B. 675, 680, s.c., sub. nom. *Windle* v. *Barker*, 25 L.J. Q.B. 349.
(4) 2 M. and G. 257. (5) 4 Ex. 135.
(6) 1 H. and N. 893. (7) 8 C.B. N.S. 45.

been held to be only an agreement: see *Tarrabochia* v. *Hickie* (1), *Dimech* v. *Corlett* (2); see also *Clipsham* v. *Vertue* (3). But with respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine established by principle, as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty; that is to say, a condition, on the failure or non-performance of which the other party may, if he be so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it, provided it has not been partially executed in his favour. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak more properly perhaps, ceases to be available as a condition, and becomes a warranty in the narrow sense of the word, namely, a stipulation by way of agreement, for the breach of which a compensation must be sought in damages: see *Ellen* v. *Topp* (4), *Graves* v. *Legg* (5), adopting the observations of Williams, Serj., on the case of *Bone* v. *Eyre*" (6).

Representation as to ship's carrying capacity.

Where the parties specify the amount of cargo to be loaded, the stipulation becomes a part of the contract. Thus, a charterer agreed to load (7) "a full and complete cargo of iron ore, say about 1100 tons." He, however, only provided a cargo of 1080 tons, the actual capacity of the ship being 1210 tons. It was held that the words, "say about 1100 tons," were not mere words of expectation, but words of contract, and that the charterer's undertaking was not to load the ship up to her actual capacity, but that 3 per cent. was a fair amount of excess over 1100 tons to allow in estimating what was a full and complete cargo of about 1100 tons, and consequently the cargo actually provided fell short of the charterer's obligation by 53 tons. Lord Esher

"About," meaning of.

(1) 1 H. and N. 183.
(2) 12 Moo. P.C. 199.
(3) 5 Q.B. 265.
(4) 6 Ex. 424.
(5) 9 Ex. 709.
(6) 2 Black 1312.
(7) *Morris* v. *Levison*, 1876, 1 C.P.D. 155.

said (1) he had often known juries in practice treat the word "about" as covering a margin of 3 per cent. The Court acted on this, and held that the charterer had not complied with his obligation so far as he had shipped less than 1133 tons—that is, 1100 tons, plus 3 per cent. The result of this decision seems to be that, if the charterer had not contracted to load "a full and complete cargo," his shipment of 1080 tons would have been a compliance with an undertaking to ship "about 1100 tons," as it would have been within 3 per cent. of it; but as he had agreed to ship "a full and complete cargo, say about 1100 tons," he was bound to go on shipping cargo until the ship was full, unless before that he had shipped so much that he could reply, in answer to a demand by the shipowners for more, that the latter was wanting more than the greatest quantity that could be described as "about 1100 tons." What is a "cargo," and what is a "full and complete cargo," is a question of fact in each case.

It is for the jury to say whether a ship or cargo complies with its description in a particular case (2), and therefore the decision of the Court in *Morris* v. *Levison* that "about" would be satisfied by a margin of 3 per cent., is not a hard-and-fast rule which settles definitely the meaning of that word in all contracts. In *Alcock* v. *Leeuw & Co.* (3), where a charter-party provided that the ship should load empty petroleum barrels, as many as required by the master, say about 5000, the word "about" was held to entitle the master to require, at his option, the shipment of 10 per cent. more or less than the amount specified.

Examples of representation as to ship's capacity.

In *Pust* v. *Dowie* (4), by a charter-party made at Liverpool for a voyage from Liverpool to Sydney, the charterer agreed to pay for the hire and use of the ship, in respect of the voyage, £1550 in full, on condition of her taking a cargo of not less than 1000 tons weight and measurement. It was held that 1000 tons of weight

(1) *Ib.*, at p. 158.

(2) See per Martin, B., *Windle* v. *Barker*, 1856, 25 L.J. Q.B. 351; and per Lord Esher, *Morris* v. *Levison*, 1876, 1 C.P.D. 158.

(3) 1883, 1 C. and E. 98.

(4) 5 B. and S. 20.

and measurement meant 1000 tons of a cargo of goods in the ordinary proportion of the port of lading, viz., one-third weight and two-thirds measurement, and not as for the Sydney market, in which the proportion is two-thirds weight and one-third measurement. In *Mackill* v. *Wright* (1) the House of Lords decided that a charterer was not entitled to an agreed *pro rata* reduction in freight where the ship had carried less than her guaranteed capacity, the deficiency having been caused by the charterers sending cargo which did not correspond in description with a representation they had made as to it. In *Carnegie* v. *Conner* (2) a charter-party which provided that the ship should "load a cargo of creosoted sleepers and timbers," contained the following clauses: "Charterer has option of shipping 100/200 tons of general cargo"; and "Owners guarantee ship to carry at least about 90,000 cubic feet or 1500 tons dead weight of cargo." It was held that the latter clauses did not amount to a warranty that the ship should be able to carry about 90,000 cubic feet of the description of cargo which the charterer was under the previous clauses entitled to tender, but was merely a warranty of the carrying capacity of the ship.

In *The Norway* (3) the charter-party contained a clause: "The master guaranteeing to carry 3000 tons dead weight of cargo upon a draft of twenty-six feet of water." Dr Lushington interpreted this as a guarantee that the ship *could* carry 3000 tons on twenty-six draft, and not as a guarantee that she would do so.

A shipowner is not estopped by the signature of the bill of lading by the master from showing that the goods, or some of them, were never actually put on board (4).

No covenant to supply full cargo.

If the whole ship is hired and the burden stated in the charter-party, and the merchant covenants to pay so much for every ton of goods loaded, but does not

(1) 1888, 14 A.C. 106. (2) 1889, 24 Q.B.D. 45.
(3) 1865, Br. and L. 377, 387.
(4) *Brown* v. *Powell Duffryn Steam Coal Company*, 44 L.J. C.P. 289.

covenant to supply a full cargo, freight upon the goods shipped and no more is payable (1).

Expense of weighing.

"In the absence of any custom to govern the matter, the person who wants to ascertain the quantity must incur the trouble and expense of weighing. It is by no means an uncommon thing to have goods weighed on board; but I never heard of the merchant being called upon to pay for it" (2).

Grain trade.

In *Watts* v. *Grant* (3), a cargo of grain was shipped from Sevastopol to Aberdeen under a charter-party known as the 1878 Black Sea Charter-Party, which provided for the payment of freight according to cubic measurement. The cargo was consigned by weight and not by measurement, the bill of lading setting forth the weight in Russian "poads." The shipowners having weighed the cargo, and also measured samples thereof, in order to ascertain the whole measurement, sued the consignees for the expense of the operation, alleging a general custom of the British shipping trade in the carrying of grain cargoes that these expenses fall to be borne by the consignee. The defendants alleged a contrary custom in the port of Aberdeen known to the plaintiffs. It was held that the defendants were liable, it being established that, by the universal custom of the shipping trade, such expenses fell to be borne by the consignee.

In *Marwood* v. *Taylor* (4) the plaintiffs (shipowners) alleged that, by a custom of the port of London, when a grain cargo in bags was discharged overside, it was the duty of the consignee to give an order to the dock company to weigh the cargo on board and to pay the dock company's charges for so doing. It was held by the Court of Appeal (affirming the judgment of Bigham, J.) that there was no such custom as alleged. Bigham, J., said: "It seems to me to be absurd to say that there is a custom which obliges the consignee to ask the

(1) *James* (*Lady*) v. *East India Company*, cited Abbott on Shipping, 14th Edit., 679.

(2) Per Willes, J., in *Coulthurst* v. *Sweet*, L.R. 1 C.P., p. 654.

(3) 1889, 26 S.L.R. 660.

(4) 1901, 5 Com. Cas. 343; 6 Com. Cas. 178.

dock company to do work which he does not want them to do. When there is no need to weigh the grain on board ship, for the purpose of regulating the rights as between buyer and seller, the only person interested in weighing the grain on board is the shipowner, because, unless and until he weighs it, he is not in a position to make an enforceable demand for the amount of his freight. In that case the shipowner has to ask the dock company to do the weighing, and he has to pay the dock company's charges for doing the work."

In *Northmoor S.S. Company* v. *Harland*(1) a charter-party provided that a ship was to deliver cargo, as customary, at such place as the consignees might direct, always afloat, cargo to be taken from alongside at port of discharge, always within reach of ship's tackles, and at merchant's risk and expense, vessel always lying afloat; the custom of each port to be observed in all cases where not specially expressed. The cargo consisted of log timber, to be delivered at the port of Belfast, and a custom of that port was proved to the effect that the delivery of log timber to the consignee was to be made after the ship had chained and rafted the timber, and it had been measured by the official measurer. It was held by the Irish Courts that the consignee, and not the shipowner, was liable to pay the expense of such rafting, and also, that as the measuring was for the benefit of both shipowner and consignee, the latter was not entitled to waive the chaining and measuring, and insist on the timber being delivered, log by log, over the vessel's side.

Consignee to pay expense of rafting.

Sometimes an option is given to the consignee to pay freight on the bill of lading quantity or on the weight delivered. In *The Dowlais*(2) it was held that this option need not be exercised until the time for paying the freight arrives, if no demand is made by the shipowner earlier.

Option to pay on bill of lading freight or on weight delivered.

In *Gulf Line* v. *Laycock*(3) wool was shipped in Australia for delivery in this country under bills of

(1) 1903, 2 Ir. R. 657. (2) 18 T.L.R. 198, 683.
(3) 1901, 7 Com. Cas. 1.

lading which provided that freight was "to be paid on delivery in cash, without deduction, on gross weight at Queen's beam." The shipowner alleged that, by the custom of the trade, the consignee had the option of having the goods weighed at his own expense, or of taking the goods without weighing at the bill of lading weight, plus 2 per cent. It was held by Kennedy, J., that there was no such custom as alleged, and that, if there had been such a custom, it would have been bad in law, as contradicting the express terms of the bill of lading.

Custom contradicting the express terms of bill of lading bad.

In *The Hollinside* (1) freight was to be paid at the rate of 9s. per ton delivered, or on the bill of lading quantity, less 2 per cent., at receiver's option. Weighing, if done, was to be at his expense. A further clause required the receiver to effect the discharge of the cargo, steamer paying one franc per ton. It was held that the two clauses of the charter-party must be read together, and, as the consignees had elected to pay freight on the bill of lading quantity, less 2 per cent., the same deduction of 2 per cent. must be allowed by the defendants, in respect of the payment of one franc per ton by the shipowner for the discharge.

Lump-sum freights.

A fixed or lump-sum freight is often defined by a specified rate upon some measure of the ship's capacity as her "registered tonnage" or "dead-weight capacity." But contracts are made in various shapes, and doubt as to the meaning sometimes arises. In *S.S. Heathfield Company* v. *Rodenacher* (2) a ship was "guaranteed by owners to carry 2600 tons dead weight." The charter-party provided that the ship should load "a full and complete cargo" at a certain freight, "all per ton dead-weight capacity as due." The charterers refused to load more than 2673 tons. A full and complete cargo would have been 2950 tons. It was held by the Court of Appeal that the charterers ought to have loaded a full and complete cargo, and that freight was payable accordingly.

(1) 1898, P. 131.

(2) 1896, 2 Com. Cas. 65. See also *Beynon* v. *Kenneth*, 8 Ct. of Sess. Cas. (4 ser.) 594.

In a document known as a "berth-note," the defendants were described as agents who had engaged "for owners' account" for the steamer R., on customary Odessa terms, a "full cargo" of grain, and were also described as charterers having the option to load the steamer at one or both of two ports. The berth-note also provided that freight was to be payable at so much "per ton on the guaranteed dead-weight capacity of 4250 tons." It was held that the defendants had undertaken the responsibilities of charterers, and that the freight was payable on the quantity of cargo actually shipped (1).

Guaranteed dead-weight capacity.

By the terms of a charter-party the freight to be paid for the hire of a vessel for a voyage was the lump sum of £10,000, the ship to take on board at the port of loading all such goods and lawful merchandise as the charterers or their agents should tender alongside for shipment, including explosives and deck cargo not exceeding what she could reasonably stow and carry. The charter-party contained the following provision: "The lump sum is based on owners' guarantee that the said steamer shall carry a dead weight of 6000 tons of cargo when loaded, according to Lloyd's rules, exclusive of 1100 tons of coal, which steamer may carry for steaming purposes, etc., of which about 800 to be carried in the hold, and the necessary stores for steamer's use for the voyage, and also that the steamer shall place at the disposal of the charterers for cargo not less than 8450 tons of 40 cubic feet cargo space, grain measurement, failing which, a *pro rata* reduction shall be made." The cubic space of 8450 tons of 40 cubic feet cargo space, grain measurement, in the vessel was placed at the disposal of the charterers; but if she had taken on board a cargo of 6000 tons dead weight, it would have been necessary to limit the quantity of coals on leaving the port of loading to 728 tons, in order to comply with Lloyd's rules as to freeboard. The charterers, in fact, loaded a cargo which filled all the available space but did not weigh 6000

Lump-sum freights.

(1) *S.S. Rotherfield Company, Ltd.*, v. *Tweedy*, 2 Com. Cas. 84.

tons, and the master thereupon took on board 1250 tons of coal for steaming purposes. The charterers deducted from the £10,000 named in the charter-party as the lump-sum freight the sum of £523, 18s. 10d., being the proportion of the £10,000 corresponding to the difference between 7100 tons (6000+1100) and 6728 tons, the total dead-weight capacity of the vessel, upon the ground that she was not of the guaranteed dead-weight capacity of 6000 tons when loaded according to Lloyd's rules, exclusive of 1100 tons of coal for steaming purposes. In an action by the shipowners to recover the £523, 18s. 10d. so deducted, it was held that the deduction had been rightly made by the charterers, and that the shipowners were therefore not entitled to recover (1).

In *Ursula Bright S.S. Company* v. *Ripley* (2) a cotton charter-party provided that the fixed freight should be reduced, proportionately, if any cargo was lost or so damaged by excepted perils as not to go forward under deck. And the charterer was to have "the option of shipping damaged cotton on deck. . . . The charterer to fully insure the freight thereon." It was held that a reasonable extra freight must be paid upon damaged cotton so shipped.

Freight payable according to agreed scale.

In some trades freights are fixed by reference to certain agreed scales of freight for different goods. In *Russian Steam Navigation Trading Company* v. *Silva*, by a bill of lading of wool from Odessa, freight was to be paid "in London, on delivery, at the rate of 80s. per cwt. gross weight, tallow and other goods, grain or seed, in proportion as per London Baltic printed rates." It was held that extrinsic evidence was admissible to show that, by the usage of the trade, the meaning of the bill of lading was that 80s. per cwt. of tallow was to be taken as the standard by which the rate of freight on all other goods was to be measured. See "Intake Measure of Quantity delivered," "Lump Freight," "Payment by Bills," "Primage."

(1) *Societa Ungherese* v. *Tyser*, 8 Com. Cas. 25.
(2) 8 Com. Cas. 171.

CHAPTER IV

Rate and Amount of Freight

By a charter-party it was agreed that a ship should proceed to Pernambuco, and there load from the factors of the freighters—having first discharged her cargo, if any—any legal merchandise, to the extent of a full cargo, that the freighters might have for shipment, and should proceed therewith to Valparaiso—a legal port between Valparaiso and Guayaquil, and Guayaquil, all or any, and there discharge the cargo laden on board at Pernambuco and at the port between Valparaiso and Guayaquil (and Guayaquil) inclusive; also discharge any goods taken on board at Valparaiso for that purpose, and at any and all the aforesaid ports should receive and take on board a full and complete cargo of legal merchandise, and therewith proceed to Cork or Falmouth for orders to discharge, and deliver the same agreeably to bills of lading, on being paid freight at and after the rate of £5, 5s. per ton, such freight to be paid in full for the voyage, the cargo from Pernambuco being freight free, as well as those goods shipped at Valparaiso, if any, for the ports at which the vessel should load her homeward cargo. The ship took in cargo at Pernambuco, which was discharged at Valparaiso. At Valparaiso she took on board goods belonging to the freighters, and also to other merchants, for Paita (a port between Valparaiso and Guayaquil) and Guayaquil, part of which was to be discharged there and the rest to be carried to England. No part of the homeward cargo was put on board at Paita. It was held that the stipulated

"In full for the voyage"—subordinate cargoes.

freight of £5, 5s. covered the whole voyage, the general words of the charter-party, "in full for the voyage," not being controlled by the clause following, and that the owner was not entitled to freight for the goods carried from Valparaiso to Paita, although no part of the homeward cargo was loaded at the last-mentioned place (1).

Alternative rate.

In *Gibbons* v. *Buisson* (2) the plaintiffs agreed with the defendants to convey a cargo to O., and, if the river was in possession of an enemy, to unload at F., outside the harbour. The freight was to be £475, or, if the vessel could enter O., discharge and reload there, £300 only: twenty-five days were allowed for unloading. The plaintiff arrived at F. on June 2, and an enemy being in possession of the river, commenced unloading there. The vessel was detained at F., partly for the convenience of the defendants, and partly by bad weather, till August 25, and by that time had discharged seven-eighths of her cargo. The enemy then having quitted the river, she entered O., where she discharged the remaining eighth of her cargo. In July the defendants' agent at O. gave the plaintiff a bill for the larger freight. In September the vessel obtained at O. a full cargo for England. It was held that the plaintiffs were entitled to the larger freight, and to demurrage from the 28th of June (3).

Sub-charter at higher rate.

In *Michenson* v. *Begbie* (4) the plaintiff by charter-party agreed with G. to convey corn at 4s. 6d. a quarter; G. made a sub-charter with S., who consigned corn to the defendants under bills of lading by which they were to pay 6s. a quarter freight, and gave them notice to retain 1s. 6d. a quarter for him. The plaintiff having sued for freight at 6s. per quarter, it was held that he was entitled to recover only 4s. 6d.

In *Wiggins* v. *Johnston* (5) a vessel was chartered by the defendant from London to Bombay, addressed to G. & Co., the defendant's agents at the latter place, and

(1) *Sweeting* v. *Darthez*, 14 C.B. 538. (2) 1 Bing. N.C. 283.
(3) See also *Fenwick* v. *Boyd*, 15 M. and W. 632.
(4) 6 Bing. 190. (5) 1845, 15 L.J. Ex. 202.

it was stipulated by another charter-party of the same date that the vessel should discharge her cargo at Bombay and then take in a homeward cargo, the defendant agreeing to pay freight as to one-half the cargo at £3 per ton, and as to the rest at the current rate of freight when the ship should be loading. It was also agreed that the master of the vessel and the agents at Bombay should be at liberty to make such alterations in the charter-party as they might mutually think proper, without prejudice to the agreement. Shortly after the arrival of the vessel at Bombay, G. & Co. agreed, by a memorandum indorsed on the charter-party, that, before loading her homeward cargo, the vessel might proceed to Aden with government coals and stores and return to Bombay with all possible despatch. The plaintiffs accordingly entered into a charter-party with the East India Company; and the vessel proceeded to Aden in February and returned thence in May, having earned freight, which was paid to the plaintiffs. It was held that G. & Co. had authority to permit the voyage to Aden, and that the defendant was bound by the alteration in the charter-party; and therefore that he was bound to pay the charter rate of £3 per ton for half the cargo, although that exceeded the current rate of freight at the time of loading, and although the alteration might be prejudicial to him; and that he was not entitled to bring into the account the freight earned by the owners on the Aden voyage.

"The highest freight paid" on same voyage.

By a charter-party for a voyage from Sundswall to Southampton, it was stipulated that the owner should receive "the highest freight which he could prove (or 'prove by evidence') to have been paid for ships on the same voyage or passage by water when the vessel passed Elsinore, but not less than 90s. per St Petersburg standard hundred." It was held that the charter-party did not contemplate strict legal proof of the actual agreement of the higher rate of freight, but reasonable evidence that such higher freight had been paid or contracted to be paid; and that the owner could not

entitle himself to a higher rate of freight than 90s. by proving that other vessels had been chartered at such higher rate for a voyage to London, that not being within the fair intendment of the charter-party for the same voyage (1).

Refusal of master to sign bills of lading at lower freight.

It is doubtful how far the master has authority, in the absence of express provision, to sign bills of lading which do not preserve the owner's rights under the charter. The charterer cannot, apart from express agreement, require him to do so (2). But as against shippers who have no notice of the terms of the charter-party, or of the extent of the master's authority, and who are not put upon inquiry by any peculiarity in the transaction (3), a bill of lading in an ordinary form is within the master's apparent authority, and is binding on the shipowner (4).

In *Hyde* v. *Willis* (5), where the charterer of a ship to Jamaica and back covenanted to load her there with a complete cargo of sugar and to pay freight at the rate of 10s. 6d. per cwt., and his agent in Jamaica tendered a complete cargo to the captain, but insisted on his signing bills of lading for it at 10s. per cwt., which the captain refused to do, it was held that the charterer was liable for dead freight.

Master's authority to make bills of lading with freight payable to third persons.

The master of a ship has no power, under his general authority, to draw bills of lading making the freight payable to others than his owner. In *Reynolds* v. *Jex* (6) a ship was chartered out and home at a lump sum, bills of lading to be signed by the shipowner or agent at any rate of freight without prejudice to the charter. At an outward port, the agents of the charterers advanced money to the master for the ship's use, on condition of the ship taking goods on the return voyage under bills of lading making this freight payable to them (the agents) or their assigns, at the port of delivery: goods were put on board, and bills of lading given accordingly by the master. It was held that the master had no

(1) *Gether* v. *Capper*, 18 C.B. 866. (2) *Hyde* v. *Willis*, 3 Camp. 202.
(3) *Small* v. *Moates*, 9 Bing. 574.
(4) *Sandemann* v. *Scurr*, L.R. 2 Q.B. 86.
(5) 3 Camp. 202. (6) 1865, 34 L.J. Q.B. 251.

authority to make such bills of lading, and that the shipowner retained his lien on goods for freight.

Cargo putting ship down to her marks without filling her.

Ships chartered by the plaintiffs in their trade loaded nickel ore in New Caledonia and proceeded to New Zealand ports to fill up, under sub-charters, unoccupied space with cargo of a dry and perishable kind. It was contemplated that in the ordinary course of business this cargo would be wool. Under a sub-charter with the defendants, the s.s. *Strathord* proceeded from New Caledonia to New Zealand to take in cargo for London. The plaintiffs guaranteed some 5000 tons space at a freight of 30s. per ton of 40 cubic feet. The defendants failed to secure an entire cargo of wool in New Zealand and loaded grain instead, which brought the ship down to her mark, leaving an unoccupied space in her of 901 tons. The defendants denied their liability to pay freight for this space. It was held that a wool cargo had been contemplated which would have filled the ship without putting her down to her marks; that it had not been contemplated that she should come home partly empty; and that the defendants were liable to pay freight for the 901 tons unoccupied space (1).

Hire of ship so long as efficient. Breakdown.

By charter-party between the appellants and respondents, it was agreed that the respondents should hire the appellants' steamship for the purpose of a voyage or voyages within certain limits at "8s. per gross registered ton per calendar month"—hire to continue until her redelivery to the appellants (unless lost) at a safe port in the United Kingdom, or on the Continent, etc. By the charter-party it was stipulated that the appellants should provide and pay for the provisions and wages of the captain and crew, and maintain the ship in a thoroughly efficient state in hull and machinery for the service; and

Cesser of hire clause.

that "in the event of loss of time from deficiency of men or stores, breakdown of machinery, want of repairs, or damage, whereby the working of the vessel was stopped for more than forty-eight consecutive hours, the payment of hire should cease until she should be again in an efficient state to resume her service." While the

(1) *Potter* v. *New Zealand Shipping Company*, 64 L.J. Q.B. 689.

vessel was on a voyage to Harburg, under the charter-party, her high-pressure engine broke down, and it was found necessary to put back to the port of Las Palmas. As repairs could not be effected in that port, the appellants and respondents agreed that a tug should be employed to tow the ship to Harburg, and that the expense, £1100, should be treated as general average on cargo, ship, and freight. As their proportion of this expense, the respondents eventually paid £867. The ship left Las Palmas on the 18th October, towed by the tug, and assisted by her own low-pressure engine, and arrived at Harburg on the 31st October. By the 18th November the cargo intended for that port was discharged, the ship's steam winches being available. On the same day the repairs to the ship's navigating machinery were completed and the voyage continued. It was held by the House of Lords that the appellants had no claim for hire for the voyage from Las Palmas to Harburg, the ship not being independently efficient for that purpose. It was further held that the appellants were entitled to payment of hire for the full time actually occupied in discharging the cargo at Harburg, the ship being in an efficient state for that particular employment (1).

Whether freight payable for whole day.

A charter-party provided that the hire of a vessel should commence at noon of a certain day, and freight was payable at so much per calendar month, and "at and after the same rates for any part of the month," until her delivery to owners. On the day the hiring terminated she was delivered to her owners at 5.30 P.M. It was held that the charterers were liable for freight for the whole day, commencing at noon of the day of her delivery (2).

Disbursements charged against freight are loans.

Disbursements charged against the freight of a vessel, but not expressed in the charter-party, are mere loans and cannot properly be deducted. In *Tanner* v. *Phillips* (3), by the terms of a charter-party it was provided that the

(1) *Hogarth* v. *Miller & Co.*, 1891, A.C. 48. See also *Vogemann* v. *Zanzibar S.S. Company*, 6 Com. Cas. 253; 7 Com. Cas. 254; *Traae* v. *Lennard* (1904), 2 K.B. 377; *Beatson* v. *Schenk*, 3 East. 233.

(2) *Angier* v. *Stewart*, 1 Cab. and E. 357. (3) 27 L.T. 480.

charterers should advance necessary funds for the ship's disbursements, not exceeding a specified amount, at the port of loading. Previously to entering into the charter-party, the owner had mortgaged the ship and freight. The charterers made advances for the ship's disbursements considerably in excess of the amount specified in the charter-party. Before the freight became due the mortgagee took possession of the ship, and stopped the cargo for freight. It was held that the charterers were not entitled to deduct from the amount due for freight the advances in excess of the sum provided by the charter-party.

Authority of master to bind owner by stipulation in charter.

It is doubtful whether the captain has authority to bind the owner by stipulations in a charter-party with respect to advances to be made to the captain by the charterer against the freight. It would seem, however, that if the owner accepts the freight under such charter-party, he may be bound by the stipulation, even if it makes the captain's receipts conclusive. But where the owner (a mortgagee) had received payment of freight from the charterer, under protest on the part of the charterer that there was a certain sum to be deducted on account of advances to the captain pursuant to stipulation in the charter, and the owner gave an undertaking to refund such sum as might appear on the charterer's account to be due by reason of such advances, and afterwards to be at liberty to dispute any of the items in the account, it was held that the charterer was entitled to recover the sum (at all events in the first instance) in an action for money had and received, it appearing that the sum had, in fact, been *bona fide* advanced to the captain, leaving the shipowner to raise the question of his liability for such advances in a separate action (1).

Foreign bill of lading. Short delivery.

In an action brought by the owners of a Danish ship against the indorsees of the bill of lading for freight on the cargo delivered to them at the port of discharge in Scotland, the defendants averred that they had not received the full cargo specified in the bill of lading

(1) *Gibbs* v. *Charleton*, 1887, 26 L.J. Ex. 321.

granted by the master at Riga, the port of shipment, and pleaded that they were entitled to retain from freight the value of the deficiency, alleging that by Danish law (the law of the flag) the bill of lading was conclusive against the owners. After a proof, which showed that the indorsees of the bill of lading had only agreed to pay for so much of the cargo as was delivered to them, it was held that the defendants had only become indorsees of the bill of lading to the extent of the cargo actually on board the vessel, and were not entitled to retain any part of the freight (1).

Tender of freight, what is?

The custom of the Caen-stone trade being to pay freight half in cash and half by a bill at two months, the agent of the owners of Caen-stone, which was brought by a vessel to an English port, verbally offered the captain of a vessel which brought it, half the amount of the freight in cash; and also offered to give the captain, per procuration, the acceptance of the principal for the other half, if the captain would draw a bill. This the captain refused. It was held a sufficient tender of the freight, as it was the duty of the captain to draw the bill (2).

Waiver of tender.

In an action for non-delivery of a cargo, it was proved that a larger sum was demanded for freight by the master than was due, and that the demand was so made as to amount to an announcement by the master that it was useless to tender a smaller sum, as it would be refused. It was held that those facts amounted to a dispensation of a tender (3).

Deficiency of bill of lading freight, payable in cash, due though vessel lost.

By a charter-party between plaintiff, owner of a ship, and defendants, it was agreed that the ship should proceed to Calcutta and there load for a home port, with the option to the charterers to send her on an intermediate voyage, freight for the same to be paid as follows: "£1200 in rupees to be advanced the master by the freighter's agents at Calcutta against his receipt,

(1) *Immanuel Owners* v. *Denholm*, 15 Ct. of Sess. Cas. (4 ser.) 152. See also *Draddy* v. *Deacon*, 2 Vern. 242.

(2) *Luard* v. *Butcher*, 2 Car. and K. 29.

(3) *The Norway*, Br. and Lush. 404; nom. *Norway (Owners)* v. *Ashburner*, 11 Jur. N.S. 892.

and to be deducted, together with commission and cost of insurance, from freight on settlement thereof, and the remainder on right delivery of cargo at port of discharge." The charter-party also contained this clause: "The master to sign the bills of lading at any current rate of freight required, without prejudice to the charter-party, but not under chartered rates, except the difference is paid in cash." The first of these provisions was complied with by the charterers advancing £1200, but they refused to pay in addition the sum of £737, 6s., which was the difference between the freight according to the bills of lading and the chartered freight. The ship was lost on the intermediate voyage. It was held by the Exchequer Chamber, affirming the Court of Exchequer, that the plaintiff was entitled to recover the sum of £737, 6s. (1).

Loading and sailing.

A debtor gave to his creditors the following order, addressed to B.: "Please to pay H. & P. (on the *Royal Oak* being loaded and sailed), out of the advance, £73"; and B. signed it, "We agree to the above, B. & Co." The ship having loaded, crossed the bar of Sunderland harbour, when the captain left her and went ashore to get the ship's papers and sign the bills of lading: the ship in the meantime stood off and on under easy sail, waiting for the captain's return. It was held, first, that the loading and sailing of the ship were conditions precedent to the payment of the money, and secondly, that the ship had not sailed (2).

Advances to captain by charterers' agent.

A ship was chartered from London to San Francisco and Victoria, Vancouver's Island, the goods to be brought to and taken from alongside at merchant's risk and expense, freight to be paid part on sailing, the residue, one moiety (if the captain so required), at each port of discharge, the ship to be consigned to charterers' agents at the port of discharge, and a stevedore recommended by charterers to be employed at ship's expense and on usual charge. At San Francisco the

(1) *Byrne* v. *Schiller*, 1871, 40 L.J. Ex. 177. See also *Hicks* v. *Shield*, 26 L.J. Q.B. 205; *Watson* v. *Shankland*, 2 Asp. M.C. 115.

(2) *Hudson* v. *Bilton*, 6 El. and Bl. 565.

agents incurred expenses in loading the cargo, a part of which were found by the jury to have been caused by the manner in which the cargo had been loaded by the stevedore in London, and in settling with the captain, presented an account in which these and other expenses, to a greater amount than the freight payable at San Francisco, were set off against the residue of the freight due on the charter. The captain objected, but on the agents threatening to arrest the ship, signed their account under protest. It was held (*a*) that, even supposing that the stevedore in London was the servant of the charterers, and that they were liable to the owner for his negligence, yet the negligence of the stevedore in London was no answer to the claim of the agents at San Francisco, for expenses properly incurred by them as agents for the owner; (*b*) that such claim of the agents against the owner could not be set off against the freight payable to the owner by them on behalf of the charterers; (*c*) that the signing of the account by the master, under the above circumstances above detailed, did not amount to such an assent to treat the cross-demand due to the agents as a payment of freight, as to constitute a defence to an action for freight brought by the owner against the charterers (1).

Insurance of balance of freight by shipowner.

Shipowner and charterer may agree, by the terms of a charter-party, that a portion of the stipulated freight shall be prepaid; and such prepayment will not affect its legal character of freight, the remainder may be the subject of insurance by the shipowner. In *Allison* v. *Bristol Marine Insurance Company* (2) a ship was chartered to sail from Greenock to Bombay, to carry a cargo of coals. Freight was to be paid on unloading and right delivery of the cargo, at and after the rate of 42s. per ton of 20 cwts. on the quantity delivered. It was provided that "such freight is to be paid, say one-half in cash, on signing bills of lading, less four months' interest at bank rate, but not less than 5 per cent. per annum, 5 per cent. for insurance, and 2½ per cent. on gross amount of freight in lieu of consignment at

(1) *Roberts* v. *Shaw*, 11 W.R. 829. (2) 1 A.C. 209.

Bombay, and the remainder on right delivery of the cargo, less cost of coals short delivered, in cash, at current rates of exchange for bills on London at six months' sight." Half of the estimated amount of the freight was paid in London. The shipowner effected two insurances, one for £500 on freight valued at £2000, the other for £700 on freight payable abroad valued at £2000. The ship was lost before entering Bombay harbour, but one-half of the cargo was saved and delivered. The master, in the belief that the prepayment had satisfied the freight on this half so delivered, made no demand on the charterer. The shipowner claimed on his policies as for a total loss of the other half of the freight. It was held by the House of Lords that, on the proper construction of the policy, the whole sum agreed upon constituted freight; that half of the whole sum of that freight had been paid in England; that it was not a prepayment of half the rate of freight calculated as distributed over the whole cargo, but of half the whole gross freight; that half of the whole sum remained to be paid abroad on right delivery of the cargo; that that half had been lost through perils of the sea, and that the shipowner was entitled on his policies on freight to recover as for the total loss of that half.

Advance on account of freight-bill.

A charter-party made in Scotland stipulated that money up to £1000 should be advanced at Calcutta, on account of freight. The charterers' agents there advanced £800 for the ship's disbursements, and took a bill drawn by the master on the charterers for that sum. The charterers accepted the bill but suspended payments, and the bill was never paid. In an action by an indorsee against the shipowners, as liable in recourse, and as having received the benefit of the advance, which he alleged was necessary, it was held that the charterers' agents, being consignees of the cargo, and taking delivery of it, were bound to make the advance on account of freight, and that there was no liability on the shipowners (1).

(1) *North Western Bank* v. *Bjornstrom*, 5 Ct. of Sess. Cas. (3 ser.) 24.

In *Santos* v. *Brice* (1) a charter-party stipulated that the ship should load a cargo of coal at Cardiff and proceed to Pernambuco, and there deliver the same and afterwards receive a full cargo of sugar and other merchandise, and therewith proceed to a safe port in the United Kingdom, and deliver the same on being paid freight at the rate of 60s. per ton of 20 cwt. net for sugar, and for other produce at a rate proportionate thereto, being in full for the round. "The freight to be paid in the following manner: £150 on signing bills of lading at Cardiff, cash for the disbursements abroad at the current rate of exchange, and the remainder on the delivery of the cargo. The master to sign bills for each cargo at any rate of freight that might be tendered. The owners to have a lien on the homeward cargo for all freight and demurrage that might accrue thereon, to the extent of the bill of lading freight, but the difference, if any, to be paid at the port of loading by captain's draft on charterers, at usance, which they agreed to accept and pay on consignee at loading port agreeing to the amount." It was held that the two clauses were not inconsistent, their meaning being, that if the bill of lading freight was less than the charter freight, the difference was to be paid at the port of loading by the captain's draft on the charterers, at usance, if the consignee settled the amount, otherwise at the port of delivery. According to bill of lading or charter-party.

In *Carr* v. *Wallachian Petroleum Company* (2) the defendants guaranteed to the plaintiff's vessel a sum of £900 gross freight, on the understanding that the vessel should be placed at once on the most profitable charter or trade procurable, and that the vessel would carry 300 tons of whatever cargo it might take on board; or should it not take 300 tons, that a proportionate reduction of the guarantee should be made for any proper quantity of cargo it might take. The vessel was loaded with barley, and the estimated freight fell short of the £900 guaranteed by £343, 6s. She was lost on the voyage. It was held that the charterers Guaranteed freight—vessel lost.

(1) 6 H. and N. 290. (2) 1867, 36 L.J. C.P. 236.

were liable to pay the £343, 6s., notwithstanding the loss, their guarantee having been broken when the cargo was shipped with a deficient freight.

By a charter-party between the defendant and H., a ship was chartered to proceed to Madras and load a cargo there from the agents of H., and being so loaded, proceed to London, and deliver the same, on being paid freight at £3, 15s. a ton, the captain to sign bills of lading for his cargo for any rate of freight required, without prejudice to this charter-party. S., who acted as agent to H. at Madras, in respect of the charter-party, by his directions purchased sugars and loaded them on board, and the captain, at the request of S., signed a bill of lading deliverable to the order of S. at £1 per ton freight. H. stopped payment, and never paid for the sugar. The sugar having arrived in London, it was held that S., or the parties in London who represented him, were entitled to the sugar on payment of the bill of lading freight (1).

Disbursements —owner's liability.

In *Macgregor's Trustee* v. *Cox* (2), the ship's husband employed a broker to collect freight, without the owner's authority, and obtained advances on security thereof. The broker collected the freight, and retained it in discharge of his advances. The ship's husband was afterwards sequestrated, and the trustees of the estate sued the owners for disbursements made by him. The owners pleaded compensation in respect of the freight collected by the broker. The trustee replied that the advances were *ultra vires*. It was held that the plea of compensation was sustained, the trustee having no higher right than the bankrupt.

Alternative rate.

In *Hedley* v. *Lapage* (3) A. undertook to smuggle goods belonging to B. into Russia; a regular bill of lading was made out of the goods, in which the freight charged was the usual freight according to the bulk of the goods; but a second contract was made between the parties, by which B. undertook to pay A. a larger sum of money if the goods should be safely landed in

(1) *Shand* v. *Sanderson*, 4 H. and N. 381.
(2) 10 Ct. of Sess. Cas. (4 ser.) 1028. (3) Holt 392.

the foreign port. The goods were landed, B. paid the freight under the bill of lading, and likewise part of the money under the agreement, but refused to pay the remainder. It was held that, notwithstanding the bill of lading, he was liable to pay the residue as extra freight.

In *Fenwick* v. *Boyd* (1) a charter-party provided that a ship should sail to any safe island or islands on the south-west coast of Africa, agreeably to instructions which were to be given to the captain in due time by the charterers or their agents, and there load from the factors of the charterers a full cargo of guano, or other lawful produce, which the charterers bound themselves to provide; and being so loaded, to proceed therewith to a safe port in the United Kingdom, and deliver the same, on being paid freight at £3, 18s. per ton, the freight to be paid on unloading and right delivery of the cargo, one-third in cash on arrival at port of destination, and the remainder by approved acceptances of three months, or cash equal thereto. And it was also agreed that, in case the charterers' agents should be unable to furnish a cargo of guano at the ports or places therein provided, they should have power to send the ship to any other safe port or ports, place or places, for obtaining a cargo of guano in the manner aforesaid, or of other goods; in which case they were to pay for such service as hire for the ship after the rate of 15s. 6d. per ton per month, such pay or hire to commence from the day of the ship's clearing outwards at the Custom House, London, and to terminate upon the ship's return to her port of delivery as thereinbefore provided for, and the discharge of the cargo. If the freighters' agents intended so to employ the ship, they were to give the master written notice of such their intention; on production whereof the freighters engaged to pay the owner in cash on account three months' pay for the hire of the ship, and the balance to be paid on the ship's return. The charterers instructed their agent on the south-west coast of Africa

(1) 15 M. and W. 632.

that the ship should proceed according to his instructions, and in case she could not find a cargo, she should proceed where he deemed it likely to procure one. The ship sailed pursuant to the charterers' directions to an island on the south-west coast of Africa, where the agent met her, and informed the captain that there was no guano to be had there, and that she must procure a cargo in Saldanha Bay (another place on the same coast), and must proceed to the Cape for a licence to load a cargo there. The ship accordingly sailed for the Cape, but being there required to enter into an engagement to sign and hand over bills of lading for the cargo as a security for the charges of the licence, the captain refused to do so unless the agent would make the freight payable according to the time employed, instead of according to the weight of the cargo, and the latter accordingly gave the captain notice that he engaged him upon time, according to the latter clause of the charter-party. It was held that this clause had come into operation, and that the time freight was recoverable.

Overpayment of freight, recovery of.

If the consignee, to get his goods delivered to him, pays more than the net weight amounts to, he may recover back the surplus (1).

Freight paid in advance—voyage in stages.

In *Greeves* v. *West India and Pacific Steamship Company* (2) the plaintiffs shipped goods at Liverpool on the defendants' ship to be carried *via* Colon to San Francisco by arrangement between the West India and Pacific Steamship Company and the Panama Railway Company and the Pacific Mail Steamship Company, freight and primage to be considered as earned, ship lost or not lost ; the freight payable in Liverpool. The whole freight was paid to the defendants' agent at Liverpool, and the bill of lading was signed by him "for the service from London to Colon," and by the agent of the other two companies "for the service from Colon to San Francisco." The ship sailed and was lost

(1) *Geraldes* v. *Donison*, Holt 346. See also *Watson* v. *Shankland*, L.R. 2 H.L. (Sc.) 304.

(2) 22 L.T. 615.

before arriving at Colon. The defendants paid over to the other two companies their proportion of the freight. The plaintiffs sued the defendants for the money so paid over to the other two companies. It was held that the bill of lading formed one contract for the carriage of the goods from Liverpool to San Francisco, and since the consideration for which the freight was paid had not wholly failed, the plaintiff could not recover.

CHAPTER V

MODE OF PAYMENT

Modes of payment.

THE freight is payable in cash, and should be paid in the currency of the place of payment, without deduction, unless the contract provides otherwise.

Custom of the port of discharge.

In *Brown* v. *Byrne* (1), however, the payment was held to be governed by a custom at the port of discharge, by which a deduction was allowed from the full agreed rate. Cotton had been shipped at New Orleans for Liverpool under a bill of lading, reserving freight for the goods "five-eighths of a penny sterling per pound." It was admitted that, according to the usual custom among merchants and shipowners at Liverpool, three months' interest or discount is deducted from freight payable under bills of lading on goods coming from New Orleans and certain other American ports, and the indorsee of this bill of lading claimed to be entitled to make that deduction. It was held that the custom was not inconsistent with the contract, and that he was entitled to do so.

Stipulations for payment explained by usage.

Agreements for the payment of freight, like other mercantile contracts, may be explained by usage. The extent to which this is permissible was laid down by Lord Campbell, who delivered the considered judgment of the Court of Queen's Bench in *Hall* v. *Janson* (2), in the following terms: "Usage may be relied upon to show the sense in which an expression found in a written contract is used in a particular trade, and a

(1) 23 L.J. Q.B. 313. See also *Thomson* v. *Adam*, 5 Moore 280.
(2) 1855, 24 L.J. Q.B. 97, 101.

usage consistent with a written contract may be introduced into it, as, both parties being aware of it, may be supposed to intend that it shall form part of their bargain. But to let in verbal evidence of a usage for the purpose of contradicting and nullifying an express written contract would be contrary to all principles, and has been forbidden as often as the attempt has been made. . . . Reference was made in the argument to the case of *Brown* v. *Byrne* (*supra*), but this Court by no means intended there to depart from the principles which we have now laid down; and the marginal note in the report would better express the view taken of the subject by the judges who concurred in that decision, if it had said that the custom 'was not inconsistent with the bill of lading,' instead of saying that it 'controlled the bill of lading.'"

Payment by bills.

Where it is agreed that payment is to be by acceptances, the master, or representative of the ship, must prepare the bills. There is no obligation on the consignee to tender them in order to entitle himself to the cargo(1). But where it is agreed that payment shall be by good and approved bills, the consignee must procure and tender them. In *Tate* v. *Meek*(2), A., as owner of a ship, covenanted with B., the freighter, for a voyage from London to Bahia, there to receive a full cargo, and to proceed to the first port in the English Channel, where, on her arrival, notice should be given to the freighters, from whom orders should be received, at what port the cargo should be delivered according to bills of lading. B. covenanted to put a full cargo on board, and to pay freight at certain rates per ton, viz., £300 in cash on the day the vessel should be reported inward at the Custom House, and the remainder by good bills, payable in London, at two months after date, from the day on which the delivery should be completed. A. bound the vessel and freight, and B. the merchandise to be taken on board her, for due performance. The vessel shipped a cargo for the freighter at Bahia, together with other

(1) *Luard* v. *Butcher*, 2 Car. and K. 29. (2) 2 Moore 278.

merchandise consigned to other persons in London. By the bill of lading, the freighter's goods were to be delivered on his paying freight for the same, as per charter-party. The vessel having arrived in London, the owner delivered the goods to the different consignees, on their paying freight reserved by bills of lading, at a less rate than that stipulated by the charter-party. The owner refused to deliver the freighter's cargo without payment of the freight due under the charter-party. It was held that he was entitled to detain it for the hire of the vessel, as the delivery of the goods and the payment of freight were concomitant acts, and that, if the master unshipped the whole of the cargo, the delivery would be complete, and that the freighter should then pay for and deliver bills for the amount of the freight, as stipulated by the charter-party.

If the consignee is to pay in bills or cash at his option, and he chooses to pay in cash, the shipowner's lien on the goods continues until cash has been given (1).

Bill of exchange not honoured.

Where there is a charter-party covenanting for payment of freight on a right and true delivery of the goods at a foreign port, the freighter is not discharged by the master there taking from the freighter's agent, who was furnished with funds to pay him the freight, a bill of exchange upon a third person, by whom it is accepted, if the bill is not duly honoured, although the agent fails with the amount of the freight in his hands, unless the master had the offer of a cash payment, and preferred the bill for his own convenience (2).

A., wishing to send goods to B at X., employed C. to carry and deliver them to B., and engaged to pay C. for the freight. C., on delivering them according to the order, took a bill of exchange from B., drawn on A., which bill was never paid. It was held that A. was liable to pay the amount of the freight to C., notwithstanding the bill of exchange (3).

(1) *Paynter* v. *James*, 2 P.C. 348.
(2) *Marsh* v. *Pedder*, 4 Camp. 257; *Taylor* v. *Briggs*, M. and M. 28.
(3) *Tapley* v. *Martens*, 8 T.R. 451.

Bill of exchange taken instead of money.

If, in a case where there is no charter-party, the captain of a ship delivers a cargo, and, as the best thing he can do for all parties under existing circumstances, takes a bill of the agent of the persons to whom the cargo on board belongs, for the amount of the freight, this does not discharge the owners of the cargo, but they are liable for freight if the bill is dishonoured; but if it appears from the other side that he might have had his money of the agent, and chose to take the bill, it is otherwise (1). The jury were directed by Abbott, C.J., to find for the defendants if they thought that the master took the bill voluntarily and for his own convenience, without insisting upon payment in cash; but to find for the plaintiffs if they thought that the master took the bill because he could not obtain payment in cash. Bayley, J., said: "The onus of proving that he could not obtain payment in any other mode lay on the plaintiffs." In *Anderson* v. *Hillies* (2), a ship-broker having received freight under a charter-party on account of the owners, went over the accounts of his disbursements on behalf of the ship with the captain (who was also the managing owner), and offered him a cheque for the balance. The captain declined to take it, but told the broker he wanted to get £250 remitted to a person residing in New Brunswick, whereupon the broker went with him and opened a credit for that sum with the British North American Bank at New Brunswick, whence a bill was drawn upon the broker at sixty days' sight, which was afterwards duly honoured. It was held that this was a good payment, as between the broker and the captain's co-owners.

Claims for damage may not be deducted.

A consignee of goods, or an indorsee of a bill of lading, has no right to have the value of missing goods deducted from the freight payable in respect of the goods delivered. But the consignee may counter-claim for the damages. See Judicature Act 1873, sec. 25 (6). This being the general law, it cannot be altered by a universal practice of merchants, which is not confined to any particular place or trade, to have

Custom of merchants.

(1) *Strong* v. *Hart*, 6 B. and C. 160. (2) 1852, 12 C.B. 499.

the value of such goods deducted from the freight. The law of a foreign country, entitling the consignee to reduce the claim against him for freight by the value of goods put on board and lost, but which amounts to an allowance by way of set-off, and not to an extinguishment of the claim for freight, is matter of procedure only, and therefore does not apply to an action for freight brought in this country against the consignee(1). It would seem, per Erle, C.J., and Byles, J., that the 3rd section of the Bill of Lading Act 1855, by which a bill of lading in the hands of an indorsee for value is made conclusive evidence of the shipment of the goods therein mentioned, against the master signing the same, applies to a master and part owner, who has signed it, in an action for freight brought by him on behalf of himself and the other owners of the vessel.

In *Campbell* v. *Thompson*(2), A. having shipped goods on board of a vessel which is driven into a foreign port by stress of weather, part of these goods is sold by the captain to defray the expenses of repairing the vessel. A. is entitled to deduct from the demand for freight, the sum for which the goods have been sold. And the circumstance of the shipowners having, during the voyage, assigned the freight to a third person, makes no difference. But it was held in the same case that the master of a vessel is not justified in selling any part of the cargo for the repairs of the ship in a foreign port, except in cases of urgent necessity.

Where claims for damage may be deducted by express agreement.

It is, however, sometimes expressly agreed that claims shall be deducted. In *Garston Sailing-Ship Company* v. *Hickie*(3) a charter-party provided that the ship should load a cargo of coal and deliver the same at the port of discharge, at a freight of so much per ton on the quantity delivered (the act of God, etc., and all and every other dangers and accidents of the

(1) *Meyer* v. *Dresser*, 1864, 33 L.J. C.P. 289. *Cf. Pellas* v. *Neptune Marine Insurance Company*, 5 C.P.D. 34. See *Seeger* v. *Duthie*, in Stephens on Demurrage, p. 60. See also *Blackburn* v. *Kymer*, 1 Marsh 223, 278; *Collier* v. *Hinde*, 17 L.T. 34.

(2) 1816, 1 Stark. 490.

(3) 1880, 18 Q.B.D. 17.

seas, rivers, and navigation, always excepted), the freight to be paid two-thirds in cash, ten days after the vessel's sailing, and the remainder in cash on the right and true delivery of the cargo agreeably to bills of lading, less cost of coal delivered short of bill of lading quantity. It was held by the Court of Appeal that a collision attributable solely to the negligence of those in charge of the other vessel was a "danger or accident of navigation" within the meaning of the charter-party, and therefore that the shipowners were not liable in respect of non-delivery of part of the cargo shipped caused by such a collision; but that the charterers were entitled, nevertheless, under the charter-party, to set off the cost of the coal so undelivered against the balance of freight payable on delivery of the remainder of the cargo at the port of discharge.

In *The Barcore* (1), however, the master of the plaintiff's vessel signed bills of lading for cargo as "in good order and well-conditioned . . . to be delivered in the like good order and condition," subject to the usual exceptions as to perils of the seas, and (by incorporation of the charter-party) with the further condition that the balance of freight was payable "on right delivery of cargo less value of cargo . . . damaged . . . not covered" by the exception. The cargo consisted of fresh cut deals, shipped, as usual, at the port of loading, without regard to the weather, which at the time was wet. During the voyage part of the cargo became tainted, discoloured, and out of condition. In an action for balance of freight, it was held by Gorell Barnes, J., that the defendants, the holders of the bills of lading, were not entitled to deduct the amount of the deterioration of the cargo from the balance of freight, as the word "damaged" referred to damage due to breach of contract by the shipowner, and did not include damage arising from want of power in the cargo to bear the ordinary transit in a ship.

(1) 1896, P. 294.

CHAPTER VI

PAYABLE TO WHOM

Generally to owner at time of contract.

THE freight is payable, primarily, to the person with whom the contract was made: that is, generally, to the person who owned the ship at the time of contracting; but the ship may have been since sold, or assigned, or mortgaged, or its freight may have been sold or assigned; if in doubt, the consignee of the goods can interplead and so avoid the difficulty of deciding between the claimants.

Recovery of freight by master.

The master has a special property in the vessel, and may declare for the freight of goods as carried in his vessel, though he is not owner (1). A captain with whom a contract is made in his own name may sue for freight under it (2). Where the master covenanted to proceed with goods from London to Tangiers, "there to apply to the correspondents, factors, or agents of the charterer for orders whether he was to proceed to St Lucar or Cadiz; and that, pursuant to the orders, he would make a right and true delivery to the correspondents, factors, or agents of the charterer agreeably to bills of lading"; and the charterer covenanted that he would pay to the master immediately on a right and true delivery of the cargo, in full for the freight of the ship, at a certain rate in sterling money; and afterwards bills of lading were signed and delivered, making the cargo deliverable at Tangiers and St Lucar, to P. (the charterer's agent at Tangiers) or his assigns, he or they paying freight for the goods, so much in sterling

(1) *Shields* v. *Davis*, 6 Taunt. 65. (2) *Seeger* v. *Duthie*, 8 C.B. N.S. 72.

money, at the current exchange at Cadiz on London; and the master was ordered by P. at Tangiers to deliver the cargo at Cadiz (by which it was averred that the master was prevented from delivering the same to any of the correspondents, factors, or agents of the charterer at Tangiers or St Lucar agreeably to the bills of lading), and did deliver it at Cadiz, to the agent of the defendant in that behalf, according to the charter-party; the master, who had received the freight from the agent, on delivery of the cargo to him, was held entitled to recover it from the charterer (1).

Payment to master.

Usually the master represents the owner, and payment of freight to him when due is effectual as against a claim by the owner, unless made after notice from the owner not to pay to him. In *Atkinson* v. *Cotesworth* (2), where a master entered into a contract of affreightment, not under seal, and the shipper agreed to pay the freight at the end of the voyage by a bill at two months, without saying to whom, it was held that the owner was entitled to receive the freight, without the intervention of the master, and that the freighter was not liable to the captain upon the contract, after he had paid the owner.

An order by the owner of a ship to a house abroad to collect freight takes the freight out of the hands of the master (3). The master of a ship has not a lien on the freight for his wages, or for his disbursements on account of the ship during the voyage, or for the premiums paid by him abroad for the purpose of procuring the cargo (4). In *Gibson* v. *Inigo* (5) it was held also that the master of a ship has no claim on the accruing freight, either for his wages or for monies disbursed by him for the use of the ship. He has no charge upon the freight for those claims such as to entitle him to possession of it, though he has a maritime

(1) *Shephard* v. *De Bernales*, 13 East. 565.

(2) 5 D. and R. 552. See *Walshe* v. *Provan*, 8 Ex. 843. See also *Harris* v. *Reynolds*, 4 W.R. 278; *De Hart* v. *Stephenson*, 1 Q.B.D. 313.

(3) *The Edmond*, 1860, Lush. 58.

(4) *Smith* v. *Plummer*, 1818, 1 B. and Ald. 575. (5) 1847, 6 Hare 112.

lien for them which is enforceable against the ship and freight by legal process (1).

In *Bristow* v. *Whitmore* (2) the master of a vessel at the Mauritius, in April, entered into a charter-party, under seal (therein describing himself as commander and owner), with the Commissariat officer there, for the conveyance of troops to Gravesend, and paid certain monies and incurred liabilities for fitting up the vessel for the purpose. In the following month he entered into another charter-party, not under seal, at the Cape of Good Hope, for the conveyance of other troops, and thereupon paid further sums and incurred further liabilities to enable him to perform the contract. The owner became bankrupt, having previously mortgaged the vessel. Upon its arrival in the Thames, the mortgagees seized it. The master filed a bill against the owner's assignees, praying a declaration that he was entitled to be repaid and indemnified out of the fund due from the Admiralty on account of the freight. The Commissioners of the Admiralty paid the amount into Court. The House of Lords held that the master was entitled to be reimbursed out of the fund. Lord Campbell, L.C., said: "In the present case the plaintiff was not to be treated as a master asking for a lien on ship or freight for his wages or his ordinary disbursements. He was an agent who had laid out money in the performance of a contract which his principal had adopted, and was therefore entitled to be repaid out of the sums which the contract had produced. The case was therefore different from *Hussey* v. *Christie*, and *Smith* v. *Plummer*, and the other cases relied on by the respondents. It was admitted that the owner, if solvent, would be liable upon the bills: they were to be paid out of the freight. Then, had he not an equitable claim on the freight before it came to the owner's hands? If so, then the right of master could not be prejudiced by the subsequent mortgage of the ship nor the bankruptcy of the owner, for mortgagees and assignees

(1) M.S. Act 1894, s. 167.

(2) 1861, 31 L.J. Ch. 467. See also *White* v. *Baring*, 4 Esp. 22.

could only claim what the bankrupt was beneficially entitled to."

The House of Lords held in *The Castlegate* (1) that the Merchant Shipping Act does not give the master of a ship a maritime lien on ship for disbursements for which he has no authority to pledge the shipowner's credit. Where there is no maritime lien there can be no lien on freight in respect of the same debt. By a charter-party it was agreed that the charterers should provide and pay for coals. In the course of a voyage it became necessary to procure coals to enable the ship to prosecute the voyage and earn freight. The master, who had notice of the terms of the charter-party, obtained the coals and drew on the charterers for the value. The bill having been dishonoured, the master was sued on it, and then instituted a cause of disbursements in the Court of Admiralty against the ship and freight. The House of Lords held that, as the shipowner was not personally liable for the disbursements, the master had no maritime lien on ship, and that although his claim for payment out of the freight was supported by considerations of equity, he had no lien on freight, since, by the practice of the Admiralty Courts, there cannot be a maritime lien on freight where there is no lien on ship in respect of the same debt (2).

The master has no maritime lien for disbursements.

A separate action cannot be maintained against the master and the owner of a ship for the same identical cause of action. The creditor has an election to sue either the one or the other; but he cannot, after he has sued the one to judgment, maintain another action against the other (3).

Separate actions against master and owner.

In *Brouncker* v. *Scott* (4) Lord Mansfield said: "How long ago it is since an action brought by a captain of a ship for freight was first entertained I do not know; but it is observable, with reference to that species of actions, that the bill of lading usually specifies 'that the captain is to deliver the goods on payment of the

(1) 1893, A.C. 38. (2) See also *The Ripon City*, 1897, P. 226.
(3) *Priestley* v. *Fernie*, 1865, 34 L.J. Ex. 172. (4) 4 Taunt. 1.

freight,' and if he delivers them without such payment, he becomes liable to his owner for so doing; it has been held, therefore, that he may maintain an action against the consignee upon an implied promise to pay the freight, in consideration of his letting the goods out of his hands before payment."

If the consignee of goods accepts any benefit by the carriage, he cannot defend himself from the payment of freight on the ground that the goods have been damaged by the master in carrying them, though the damage exceed the amount of freight (1).

By a charter-party, containing the usual exceptions, freight was made payable on the unloading and right delivery of the cargo, which was to be provided by the charterers; the master was to sign bills of lading at the port of loading, and, upon the completion of the loading, the charterers' liability under the charter-party was to cease. The charterers having placed the cargo on board at the port of loading, bills of lading were signed by the master whereby the cargo was made deliverable to the shippers or their assigns at the port of discharge, "they paying freight for the same as per charter-party." In an action by the master against the charterers for freight, it was held that the master, in signing the bills of lading, had done so merely as agent for the shipowner, and was therefore not entitled to maintain the action. Bigham, J., said (2): "There are only two ways in which a promise can possibly arise on the part of the defendants to pay freight to the plaintiff. It can arise out of the bill of lading itself, or it can arise by implication from the delivery of the goods by the plaintiff at the defendant's request. There can be no doubt that, where a master signs a bill of lading without qualification, that is to say, without anything in the document to show that he does so merely as agent, he makes himself personally liable upon it to the shipper. The shipowner who has

(1) *Shields* v. *Davis*, 1815, 6 Taunt. 65; *Isberg* v. *Bowden*, 22 L.J. Ex. 322.
(2) *Repetto* v. *Millar's Karri and Jarrah Forests, Limited*, 1901, 2 K.B. 306, 310.

authorised the master to sign the bill of lading is also liable upon it. The one liability arises out of the representation on the document that the master is a principal; the other liability arises out of the circumstance that in truth the master has signed for the shipowner. The master is estopped from denying the truth of the representation which he has made; in other words, he is not allowed to give evidence to discharge himself from a liability which he has apparently undertaken; and the shipowner is bound by the contract because it has been entered into on his behalf and with his authority. Thus two separate liabilities are created for the performance of one contract. But no difficulty arises out of this state of things, for the shipper has not a concurrent remedy against both master and owner; he has merely a right to elect which of the two he will hold liable, and having once finally elected, his remedy against the other is gone; and as either master or owner may be sued, so either may sue, for the existence of the liability, on the one hand, involves the existence of the correlative right on the other. These rules apply not merely to contracts created by bills of lading, but to all simple contracts; they form part of the law relating to principal and agent."

Rights of part owners *inter se.*

Part owners are tenants in common of the ship, but jointly interested in her use and employment; and the law as to the earnings of a ship, whether as freight, cargo, or otherwise, follows the general law of partnership (1).

Right of ship's husband to be repaid out of the freight.

The right of a ship's husband to be repaid out of the freight for advances made on account of the ship is a right of lien or retainer and not in the nature of a charge on the freight; and therefore, if he is removed from his office by the owners before he is in a position to receive the freight, an assignee of his interest in the freight cannot maintain a claim to it as against the owners (2).

Ship mortgaged.

When an entire ship is in mortgage, in order to defeat the right of the mortgagor to receive the freight,

(1) *Green* v. *Briggs*, 17 L.J. Ch. 323; *Holderness* v. *Shackels*, 8 B. and C. 612.
(2) *Beynon* v. *Godden*, 1878, 3 Ex. D. 263.

Upon sale of ship, freight passes to purchaser.

Where a ship has been sold after the contract of carriage has been made, the right to the freight passes to the purchaser. The right to freight is incidental to the ownership of the vessel which earns it, and therefore a transfer of a share in a ship passes the corresponding share in the freight, under an existing charter-party, without the mention of the word "freight." In equity an assignment of freight to be earned is valid (1).

In *Lindsay* v. *Gibbs* a ship was chartered by her owner. Afterwards, in June 1854, he sold twenty-four shares of the ship to A., and the remaining forty shares to B., and in December he assigned the freight to C. A. registered before, and B. after, C.'s assignment; but C. gave the first notice to the charterers. It was held that C.'s right to the freight had priority over B. but not over A. (2).

This distinction between transfers which have, and have not, been registered would not now arise, under the Merchant Shipping Act 1894. For though a purchaser is required, by section 26 of that Act, to register his transfer, its validity is not made to depend upon the registration. Nor, generally, would the neglect to register give a subsequent assignee of the freight any equity to it, as against the transferee of the ship. And that is so although the transfer of the ship be to a mortgagee only, if he has taken possession of her.

Abandonment to underwriter transfers after-earned freight.

An abandonment to the underwriter on ship transfers the freight subsequently earned as incident to the ship. Therefore, where the ship and freight were insured by separate sets of underwriters, and the ship, being a general ship, was captured, and ship and freight were abandoned to the respective underwriters, who paid each a total loss; and the ship being recaptured, performed her voyage and earned freight, which was received by the defendant for the use of those who were

(1) *Lindsay* v. *Gibbs*, 1856, 22 Beav. 522. See *Young* v. *Lindsay*, 27 Beav. 405.

(2) See also *Morrison* v. *Parsons*, 2 Taunt. 407.

legally entitled thereto, it was held that the underwriter on ship was entitled to recover (1).

Freight to be earned under a charter-party is not an incident to the ownership of the vessel; and therefore, although an underwriter of a policy of insurance upon the vessel herself becomes, by abandonment to him upon a constructive total loss happening through the fault of another vessel, entitled, after payment of the sum secured by the policy, to every benefit accruing from the ownership of the insured vessel, he cannot claim any part of the damages recovered from the owners of the wrongdoing vessel on account of loss of freight intended to be earned by the insured vessel (2).

In *Stephenson* v. *Dawson* (3) it was held that the right to the freight under a charter-party did not pass to the legatee of the ship.

The only effect of the omission to register a mortgage of a ship is to postpone the mortgagee's claim to that of a subsequent mortgagee or transferee whose mortgage or transfer is registered before it. Therefore the non-registration of the mortgage affords no answer to the claim of the first mortgagee to freight earned by the ship as against a purchaser of the cargo without notice of the mortgagee's title (4).

A covenant in a charter-party of affreightment to pay freight to the owner for the hire of the vessel is not transferred to the purchaser by a bill of sale of the ship, made during the voyage; and such owner afterwards becoming bankrupt, his assignees, and not the purchaser of the ship, have the legal right to receive the freight and demurrage due from the freighter upon the charter-party (5).

Charter-party or bill of lading freight.

A factor hired a ship of the plaintiff at £48 per month, and by the charter-party goods put on board were made liable to the plaintiff for the ship's hire. Merchants in

(1) *Case* v. *Davidson*, 1816, 5 M. and S. 79.

(2) *Sea Insurance Company* v. *Hadden*, 1884, 13 Q.B.D. 706. See also per Brett, M.R., pp. 713, 716.

(3) 3 Beav. 342. (4) *Keith* v. *Burrows*, 1876, 1 C.P.D. 722.

(5) *Splidt* v. *Bowles*, 10 East. 279. *Cf. Rusden* v. *Pope*, L.R. 3 Ex. 269. See now Judicature Act 1873, s. 24 (1).

the West Indies, his principals, put goods on board, paying the factor £9 per ton freight. The factor became bankrupt. It was held that the plaintiff was entitled to be paid freight by the merchants at £9 per ton in preference to the assignees. It was held also, that the factor had no power to bind the goods by charter-party to answer charter-party freight (1).

The defendants chartered a ship to sail to T., and there load a cargo at 60s. per ton freight. They wrote to the plaintiffs asking them to instruct their firm at T. to re-charter the ship for the defendants at the best rate they could, and stating that if there should be a loss the plaintiffs' draft for the difference should be honoured. The rate of freight at T. being only 40s. per ton, the plaintiffs put their own cargo on board, drawing upon the defendants for the difference between 40s. and 60s. freight. The ship was lost and the defendants refused to accept the draft. It was held that the cargo when on board being liable to the shipowner for freight at 60s. instead of 40s., there was such a loss as contemplated in the letter, and that the defendants were liable for not accepting the draft (2).

If by a bill of lading goods are made deliverable to A. or his assigns, he or they paying freight for the same, and A. assigns the bill of lading to B., and B. assigns it to C., who accepts the goods under it, C. is liable to an action for the freight at the suit of the master of the ship (3).

A consignee of goods who is merely agent for the owner is not liable for the freight simply as consignee. But such liability may arise either under the express terms of a bill of lading, or, in cases where there is no bill of lading, from the previous usage and course of dealing between the parties on former occasions of the like nature (4).

In *Dougal* v. *Kemble* (5) goods were consigned to

(1) *Paul* v. *Birch*, 2 Atk. 621. (2) *Yeames* v. *Lindsay*, 3 L.T. 855.
(3) *Cock* v. *Taylor*, 1811, 2 Camp. 587.
(4) *Coleman* v. *Lambert*, 1839, 9 L.J. Ex. 43.
(5) 1826, 3 Bing. 383. See also *Bell* v. *Kymer*, 3 Camp. 545; *Smurthwaite* v. *Wilkins*, 5 L.T. 842.

L. C. & Co. or their assigns, "he or they paying freight for the same." L. C. & Co. indorsed the bill of lading to K., their broker, and then became bankrupt. The shipowner, in ignorance of these circumstances, applied to L. C. & Co. for the freight, and then sued K. for it. It was held that K. was liable.

If the owner of a ship, having chartered her for a voyage, assigns her before the voyage, though he afterwards assign the charter-party to another, if she earns freight, the assignee of the ship is entitled to the freight, as incident to the ship (1). Under the Bills of Lading Act, 18 & 19 Vict. c. 111, the rights and liabilities of the consignee or indorsee of the bill of lading pass from him by indorsement over to a third person (2).

Freight belongs to mortgagee of ship on his taking possession.

Where the ship is mortgaged only, the mortgagee does not thereby acquire the right to accruing freight, unless he also takes possession of the ship. A sale carries the right to all accruing freight from the time of assignment, a mortgage only from the time of taking possession (3). And that is so whether the mortgage was made before or after the voyage commenced. A mortgage of a vessel carries with it the freight, and the mortgagee intervening by taking possession, before the freight becomes payable, is entitled, as against the mortgagor or his assignees in bankruptcy, to receive it (4).

The assignee of the freight of a particular voyage, who has given notice of his security to the charterers, has a better equity than a prior registered mortgagee of the ship who has taken a general assignment of the freight as additional security but has omitted to give notice thereof. It would seem that this is so notwithstanding the mortgage deed contains a recital of the general assignment (5).

(1) *Morrison* v. *Parsons*, 1810, 2 Taunt. 407.

(2) *Smurthwaite* v. *Wilkins*, 11 C.B. N.S. 842.

(3) *Chinnery* v. *Blackburn*, H. Bl. 117, *n.*; *Gardner* v. *Cazenove*, 26 L.J. Ex. 17; *Keith* v. *Burrows*, 2 A.C. 636; *Briggs* v. *Wilkinson*, 7 B. and C 30.

(4) *Rusden* v. *Pope*, 1868, L.R. 3 Ex. 269. See also *Wilson* v. *Wilson*, 14 Eq. 32.

(5) *Brown* v. *Tanner*, 1866, 14 W.R. 911.

When a mortgagee has taken possession of the ship he takes the right to all the freight which is then accruing (1). "And if he finds any cargo on board in respect of which the freight has accrued, and on which the mortgagor has a lien for the freight, the mortgagee succeeds to that lien, and can enforce it in a court of law" (2).

In *Willis* v. *Palmer* (3) the owner of a ship, by power of attorney, authorised his agent to sign any bottomry bond or instrument of hypothecation on the ship or her cargo, and to sell and dispose of, either absolutely or by way of mortgage or otherwise, as he should think proper, the ship or any share thereof, and to execute all instruments and do all acts which should be requisite and necessary for completing such sales, transfers, mortgages, or any of them, and generally to do all acts about the business and affairs aforesaid which the owners, if present, could have done. Under this power the agent, by deed, reciting a mortgage of the ship, and the necessity for further advance to enable her to set sail, and the advance of £4000 for that purpose by the plaintiffs, assigned to them all the freight, hire, and passage-money and earnings of the ship in her intended voyage. After the ship sailed the agent received bills in payment of passage-money by the passengers, the proceeds of which the owner received before the ship completed her voyage. It was held that the power of attorney authorised the assignment of this passage-money, and that the assignment gave the plaintiffs an immediate right to the passage-money before taking possession of the ship, and that they were entitled to recover it back from the owners. A mere mortgage of the ship does not give the mortgagee a right to the earnings of the ship received by the mortgagor after the execution of the mortgage, but before the mortgagee takes possession (4).

(1) *Kerswill* v. *Bishop*, 2 C. and J. 529; *Gumm* v. *Tyrie*, 33 L.J. Q.B. 97; 34 L.J. Q.B. 124; *Dean* v. *M'Ghee*, 4 Bing. 45.

(2) Per Mellish, L.J., *Keith* v. *Burrows*, 2 C.P.D., at p. 165. *Cf. Brown* v. *Tanner*, L.R. 3 Ch. 597.

(3) 1860, 29 L.J. C.P. 194. (4) See also *Essarts* v. *Whinney*, 88 L.T. 191.

A mortgagee of a ship is not entitled to unpaid freight of previous voyages which became due prior to the date of his taking possession of the ship (1). Freight of previous voyages.

In *Keith* v. *Burrows*, Lord Cairns, L.C., said (2): "When a mortgagee takes possession he becomes the master or owner of the ship, and his position is simply this: from that time everything which represents the earnings of the ship, which had not been paid before, must be paid to the person who then is the owner, who is in possession. The owner then in possession happens to be the mortgagee, and it is in consequence of his filling that position, and not by virtue of any contract or any antecedent right, that he becomes the person entitled to receive the freight. But that right again is itself checked by another consideration. All that he can receive is that which the ship was in the course of earning, either by way of express contract, or, which is the same thing, by carrying goods upon a *quantum meruit.*" The owner of the ship cannot, by his subsequent acts, give to his mortgagees, as against the holder of a bill of lading, rights different from those possessed by himself under it. Goods which, by the terms of the bill of lading, have been carried upon a nominal amount of freight, can be lawfully demanded, by the holder of the bill of lading, on payment of that amount (3). Goods carried at nominal freight.

The master, until he receives notice of the change of ownership, retains the power which has been conferred upon him by the original owners, so far as to bind the new owners by contracts for the carriage of goods entered into by him pursuant to his original instructions (4). Master retains his powers until he receives notice.

A mortgagor of a ship, remaining in possession, retains all the rights and powers of ownership, and his contracts with regard to the ship will be valid and effectual, provided his dealings do not materially impair the security of the mortgagee; and a mortgagee Power of mortgagor in possession.

(1) *Shillito* v. *Biggart*, 1903, 1 K.B. 683. (2) 2 A.C., p. 646.
(3) *Keith* v. *Burrows*, 2 A.C. 636. See also *Brown* v. *North*, 22 L.J. Ex. 49.
(4) *The Mercantile and Exchange Bank* v. *Gladstone*, 1868, L.R. 3 Ex. 233.

will be restrained, by injunction, from interfering with the due execution of such contracts. Therefore a mortgagor in possession of a ship, having entered into a beneficial charter-party, the mortgagees may be restrained, at the suit of the charterer, from dealing with the ship in derogation of the charter-party (1).

Where there are several mortgagees.

Where there are several mortgagees of a ship they rank according to the dates at which they were registered, not according to the dates at which they were made (2). And the right of mortgagees to the freight follows the same rule. A second or subsequent mortgagee may perfect his right to the freight by taking possession subject to the rights of the prior incumbrances. "Although a second mortgagee has no legal as distinguished from equitable right to possession, and although he cannot take possession as against a first mortgagee, yet as against all other persons he has a right to take possession, and can enforce such right if necessary by obtaining the appointment of a receiver" (3).

First registered mortgagee taking possession.

The first registered mortgagee of a ship, by taking possession of her before the freight is completely earned, obtains a legal right to receive the freight, and to retain thereout not only what is due on his first mortgage, but also the amount of any subsequent charge which he may have acquired on the freight, in priority to every equitable charge of which he had no notice; and it makes no difference that a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight (4).

"What is the position of a second mortgagee of a ship with respect to freight? He has no legal right to take actual possession, and cannot therefore by his own act give himself that which is equivalent to possession. But as between himself and the mortgagor, the equitable right of the second mortgagee is the same as the legal right of the first mortgagee: just as in the case of

(1) *Collins* v. *Lamport*, 34 L.J. Ch. 196.
(2) M.S. Act 1894, s. 33. (3) *Keith* v. *Burrows*, 1 C.P.D. 736.
(4) *Liverpool Marine Credit Company* v. *Wilson*, 1872, 7 Ch. 507; *Tanner* v. *Phillips*, 42 L.J. Ch. 125; *The Two Ellens* v. *Black*, 41 L.J. Adm. 33.

and, if the first mortgagee declines to take possession, the second mortgagee may obtain a receiver, and so have the possession and the benefits of the possessory right. But this is to be understood only as between the second mortgagee and the mortgagor. As regards the intervening incumbrances, interests, and titles of every kind not requiring registration, the respective positions of the first and second mortgagees are essentially different, arising from the essential difference between a legal and an equitable title. The legal owner's right is paramount to every equitable charge not affecting his own conscience; the equitable owner, in the absence of special circumstances, takes subject to all equities prior in date to his own estate or charge. The Courts of Equity, in appointing a receiver at the instance of an equitable incumbrancer, takes possession in fact on behalf of all, and so as not to disturb any legal right, or interfere with equitable priorities.

"If there be a legal mortgage of a ship, then a charge on the freight, then a second mortgage of the ship, the second mortgagee of the ship cannot by any act of his oust the incumbrance on the freight. And if the first mortgagee of the ship takes, under these circumstances, possession of the ship, his possession cannot be allowed to alter the equities of the parties. He takes both ship and freight by the same title; and, there being one equitable owner of the ship, and another equitable owner of the freight, as between those equitable owners his charge must be considered as satisfied *pro rata*, just as if there was a first mortgage on Whiteacre or Blackacre belonging, subject to that mortgage, to several owners" (1).

What is sufficient possession?

To entitle the mortgagee to freight, the ship must have been working for him, it must have been earning freight whilst he was in possession; not necessarily physical, manual possession, but such possession, for instance, as may be constituted by giving notice to the charterer, while something remains to be done by the

(1) Per James, L.J., in *Liverpool Marine Credit Company* v. *Wilson*, 1872, 7 Ch. 511.

ship to make the freight payable. It is not, however, necessary that the possession should have been taken before or during the continuance of the voyage. Where the freight is payable on delivery it is enough if possession be taken before the cargo is delivered (1). But possession after the cargo has been delivered, though before the freight has been paid, will not suffice (2).

In *Brown* v. *Tanner* (3) a vessel was chartered to proceed to A., there take in a cargo to be shipped by the charterers, and return direct to London. After the ship's arrival in the port of London, and whilst the cargo was in course of delivery, a mortgagee, under an ordinary statutory mortgage made prior to the date of the charter-party, took possession. It was held that he thereby acquired a right to the freight in priority over an assignee of the freight by a deed executed subsequently to the charter-party, notice of which had been given to the charterers. The freight upon a charter-party is not earned until the unloading and delivery of the whole cargo has been completed.

Assignment of freight.

The mortgage of a ship carries with it a right to receive the freight earned by the ship; and although the mortgagee cannot recover back from the mortgagor freight which he has allowed the mortgagor to receive, yet he may at any time intercept the freight by giving notice to the mortgagor, consignee, or charterer that he intends to exercise his right of property, and to require the freight to be paid to him. In *Wilson* v. *Wilson* (4) the owner of a ship assigned the freight not yet earned, and three days afterwards, with the knowledge of the assignee, mortgaged the ship to the defendants, who registered their mortgage. The assignee neglected to give notice of his claim upon the freight to the mortgagees. It was held that the assignee was not entitled to set up any right to such freight in opposition to the rights of the mortgagees (5).

(1) *Cato* v. *Irving*, 21 L.J. Ch. 675; *Rusden* v. *Pope*, L.R. 3 Ex. 269; *Gibson* v. *Inigo*, 6 Hare 112. *Cf. Alexander* v. *Simms*, 23 L.J. Ch. 721.

(2) *Chinnery* v. *Blackburne*, 1 H. Bl. 117, *n.* (3) 37 L.J. Ch. 923.

(4) 1872, 14 Eq. 32. (5) See also *The Bennell Tower*, 72 L.T. 664.

The freight may be assigned, separately from the ship, before it has been earned, or even contracted for; and the freighter cannot safely pay it to the shipowner after receiving notice of the assignment.

Freight may be assigned separately from the ship.

In *Leslie* v. *Guthrie* (1) the owner of a ship agreed with the defendant for the carriage of goods, etc., on a voyage on which the ship was then actually engaged, for a certain sum freight. The shipowner, being indebted to others, assigned to them the freight and other earnings of the vessel upon her then voyage, by way of security for debts larger in amount than the freight, etc., and gave the defendant notice of such assignment. He (the owner) afterwards became bankrupt, and in an action by the assignees against the defendant to recover the freight said to be due to the bankrupt before his bankruptcy, it was held that the right to the freight was not in the plaintiffs, but that it passed to the creditors of the bankrupt by the assignment which he (the bankrupt) made after his bankruptcy, and of which assignment the defendant, debtor of the bankrupt, had notice.

In *Douglas* v. *Russell* (2), A., a shipowner, assigned to B. the freight earned and to be earned by one of his ships, and afterwards chartered her to C. for a voyage to S. The outward freight was paid to A. before the ship sailed. The charter-party was afterwards delivered to B. by A.'s direction, and B. gave notice of the assignment to C. Afterwards, but before the ship returned, A. became bankrupt. It was held that the homeward freight was not in A.'s order and disposition at his bankruptcy, and therefore that B. was entitled to it.

An assignment of the freight, earnings, and profits of a ship does not extend to profits not in existence, actual or potential, at the time of the assignment; therefore, where C. assigned by deed to S. the freight, earnings, and profits of the ship W., which ship afterwards, in a voyage to the South Seas, obtained a

(1) 1835, 4 L.J. C.P. 227.
(2) 4 Sim. 524. See also *Gardner* v. *Lachlan*, 8 L.J. Ch. 82.

quantity of oil, the produce of whales taken in the said voyage, it was held that this oil did not pass to S. by the assignment; for the assignor had no property, actual or potential, in the oil, at the time of assignment, and the voyage was not then contemplated (1).

Assignment of part-owner's shares.

An assignment of freight must be distinguished from an assignment by a part owner of his shares in it. The part owner is only entitled to a share of the surplus after discharging expenses.

As between assignor and assignee an assignment of freight takes effect at once, and is not dependent upon the assignee taking possession of the ship, or giving notice to those who are liable to pay. If the freight is received by the owner, the assignee may claim it from him (2).

Several assignees.

Apart from the Judicature Act 1873, s. 25 (6), an assignment of freight gives only an equitable interest to the assignee. That Act provides that, where an absolute assignment of freight which has been contracted for is made by writing under the hand of the assignor (not purporting to be by way of charge only), and express notice in writing has been given to the person from whom the assignor would have been entitled to claim the freight, the assignment is effectual in law to transfer the legal right to the freight from the date of such notice (3). But the Act expressly provides that the legal transfer of the right to the freight is to be subject to all equities which would have been entitled to priority over the right of the assignee if the Act had not passed. And thus the order in which equitable interests take priority is the material question.

Equitable assignees.

Equitable assignees rank, *prima facie*, in the order of their assignments; but a subsequent incumbrancer, taking without knowledge of an earlier assignment, becomes entitled to the prior charge if he first gives notice of his claim to those by whom the freight is or

(1) *Robinson* v. *Macdonell*, 1816, 5 M. and S. 228.

(2) *Willis* v. *Palmer*, 29 L.J. C.P. 194. See also *Boyd* v. *Mangles*, 18 L.J. Ex. 273; *Mangles* v. *Dixon*, 3 H.L. Cas. 702.

(3) See Judicature Act 1873, s. 25 (6); *Brice* v. *Bannister*, 3 Q.B.D. 569.

will be payable (1). Or, if the freight has been paid, and is held in trust by some person (*e.g.* a mortgagee of the ship in possession (2)), such priority may be acquired by first giving notice of the claim to the trustee, after it has come to his hands. A notice given to one who becomes a trustee of the freight before he has in fact received it, will not have the effect of changing the order of priority given by the dates of the assignment (3).

Priorities of assignees of freight and assignees of ship.

Where an absolute assignment of freight has preceded a sale or mortgage of the vessel, the title of the assignee is effectual as against the subsequent assignees, either of ship or freight, provided the conditions of s. 25 (6) of the Judicature Act 1873 are satisfied, for the assignee acquires the legal title to the freight. But in cases to which the Judicature Act does not apply, as the assignment of freight gives only an equitable interest, it is liable to be defeated by the legal title to the freight acquired by a purchaser or mortgagee of the vessel who takes without notice (4). A second or subsequent mortgage of the ship will not, however, have this effect, for a second mortgagee only takes an equitable interest in the freight, and will therefore be postponed to a prior equitable assignee of that freight (5). The master has no power to assign freight (6).

But an assignment of freight *after* the sale of the ship is of no avail, for the right to the accruing freight passed on the sale (7). And though an assignment of freight made after a *mortgage* of the ship is effectual, unless the mortgagee takes possession before the freight becomes due, yet, if the mortgagee takes possession, the assignment of freight does not

(1) See notes to *Ryall* v. *Rowles*, 1 W. and T., Leading Cases, 96, p. 103; *Marchant* v. *Morton* (1901), 2 K.B. 829; *Re Lake, Ex parte Cavendish* (1903), 1 K.B. 151.

(2) See the judgment of the Common Pleas Division in *Keith* v. *Burrows*, 1 C.P.D. 722, p. 736.

(3) See *Buller* v. *Plunket*, 30 L.J. Ch. 641; *Johnston* v. *Cox*, 16 Ch.D. 571.

(4) *Wilson* v. *Wilson*, L.R. 14 Eq. 32.

(5) *Liverpool Marine Credit Company* v. *Wilson*, 7 Ch. 507; *The Bennell Tower*, 72 L.T. 664.

(6) *The Sir Henry Webb*, 13 Jur. 639. See also *Lindsay* v. *Gibbs*, 28 L.J. Ch. 692.

(7) *Lindsay* v. *Gibbs*, 22 Beav. 522. See also *Miln* v. *Walton*, 7 Jur. 892.

avail against him (1), for the mortgagor has not power to prevent the mortgagee from taking the freight if he takes possession of the ship. "So to hold would enable the mortgagor to deprive the mortgagee of the whole benefit of the security. The ship might be chartered for several years, and the freight immediately assigned behind the back of the mortgagee" (2).

Consignee may set off debts due from shipowner.

In *Wilson* v. *Gabriel* (3), a shipowner during the voyage assigned the accruing freight on goods conveyed for the defendants in a ship. Before notice of assignment, the shipowner had become indebted to the defendants. It was held, in an action by the shipowner, for and on account of the assignees against the defendants, for the freight, that the defendants were entitled to set off the debt due from the shipowner to them, and that the assignment did not prevent them from so doing (4). But where the debts have accrued after notice of assignment, they cannot be set off (5). Where a lien for the freight is available, a set-off will not defeat that (6). In *American Steel Barge Company* v. *Chesapeake & Co.* (7) it was held by the American Courts that a lien on sub-freights reserved by a shipowner in a time-charter will be given preference over a general right of set-off existing in favour of a cargo owner against the charterer, especially where, so far as appears, his lien, which relates back to the date of the charter, is prior to the charterer's indebtedness to the cargo owner. The mortgagee of a ship which is left in possession of the owners, on subsequently taking possession under the mortgage, is entitled to the freights thereafter coming due, whether or not they were earned in whole or in part before he went into possession; but he is entitled to such freights

(1) *Brown* v. *Tanner*, L.R. 3 Ch. 597; *Keith* v. *Burrows*, 1 C.P.D. 722; 2 C.P.D. 163, at p. 172.

(2) Per Page Wood, L.J., in *Brown* v. *Tanner*, L.R. 3 Ch., p. 603.

(3) 8 L.T. 502.

(4) See also *Campbell* v. *Thompson*, 1 Stark. 490; but see *Tanner* v. *Phillips*, 42 L.J. Ch. 125.

(5) *Weguelin* v. *Cellier*, L.R. 6 H.L. 286; *Watson* v. *Mid-Wales Railway Company*, 2 C.P. 593.

(6) L.R. 6 H.L. 286; *De Pothonier* v. *De Mettos*, 27 L.J. Q.B. 260.

(7) 115 Fed. Rep. 669.

subject to such engagements as the owners have previously entered into in respect to the voyage, they having the right to full control and to make any contracts necessary for the operation of the vessel so long as they remained in possession (1).

Bottomry on freight.

A bottomry bond cannot affect a previous contract in a charter-party, so as to take precedence of money advances made subsequently to the bond under the authority of the charter-party. Advance of money on freight can only be made in pursuance of a charter-party (2).

Is owner or charterer entitled to bill of lading freights?

In *Neill* v. *Ridley* (3) by a charter-party it was "agreed that (the cabin and state-rooms, and sufficient room, ship's stores, provisions, water and crew throughout this charter-party being excepted, reserving, however, every such room only for that purpose as the owners would, were the ship to be loaded for their exclusive benefit) the vessel shall immediately be ready, and take on board from the charterers (who were to have the full reach of the vessel's hold from bulkhead to bulkhead, including the deck) a full and complete cargo," and thereupon proceed to Halifax. It was held that the owners of the vessel, and not the charterers, were entitled to the freight for goods loaded on the deck of the vessel (4).

In *Youle* v. *Cochrane* (5) it was held that a shipmaster appointed by the owners of a vessel employed under a charter-party had, as representing the owners, a lien over a cargo placed on board by a sub-freighter to the extent of the sub-freight, irrespective of any stipulations regarding the payment thereof between the sub-freighter and the charterer; and therefore, that the person to whom the cargo had been consigned, who had paid the

(1) *Merchant Banking Company, Ltd.*, v. *Cargo of Afton*, 125 Fed. R. 258.

(2) *The Salacia*, 32 L.J. Adm. 43. See also *The Standard*, Swab. 267; *The Karnak*, L.R. 2 P.C. 505; *Tanner* v. *Phillips*, 42 L.J. Ch. 125; *The John*, 3 W. Rob. 170; *The Catherine*, Swab. 263.

(3) 2 C.L.R. 1018. See also *Fox* v. *Nott*, 30 L.J. Ex. 259; *Wilkens* v. *Mure*, 1 Cox 150; *Harris* v. *Reynolds*, 4 W.R. 278; *Mitchell* v. *Burn*, 2 Ct. of Sess. Cas. (4th ser.) 900.

(4) See also *Zwilchenbart* v. *Henderson*, 23 L.J. Ex. 234.

(5) 2 Ct. of Sess. Cas. (3rd ser.) 427.

shipmaster the full freight, in ignorance that the shipper had paid one-third thereof to the charterer, had no claim for repetition against the owners, who had not been overpaid.

But the question whether the owner or the charterer is entitled to the bill of lading freight when received depends upon the contract between them (1).

Right of underwriters to freight after abandonment.

In all cases of insurance on ship, in which the subject is not actually annihilated, the assured claiming as for a total loss must give up to the underwriters all the remains of the property recovered, together with all benefit or advantage incident to it, or rather, such property rests in the underwriters. Freight, while the ship is in the course of earning it, is a benefit or advantage incident to the ship, and therefore becomes the property of the underwriters, paying for a total loss (2).

But in *Miller* v. *Woodfall* (3) a shipowner loaded his ship, which was bound for Liverpool, with goods on his own account; and he insured the ship and the freight of the said goods by distinct insurances. The ship was stranded at S. on the English coast, twenty miles from Liverpool. The shipowner abandoned the ship to the insurers on the ship. After the abandonment, the shipowner, at his own expense, had a part of his goods taken out and conveyed by lighters to Liverpool; and he, at his own expense, procured assistance by which the ship, with the remainder of his goods on board, was brought to Liverpool. Afterwards, the assurers accepted the abandonment. On the assured claiming for the loss of the ship from the assurer, the assurer claimed credit for the freight of the goods of the shipowner. It was held that nothing in the nature of freight for the carriage of the shipowner's goods to S. passed to the abandonees; but that they were entitled to an allowance for the carriage of the part of the goods from S. to Liverpool

(1) *Michenson* v. *Begbie*, 6 Bing. 190. See also *Christie* v. *Lewis*, 2 B. and B. 410; *The Canada*, 13 T.L.R. 238; *Janentzky* v. *Langridge*, 1 Com. Cas. 90; *Marguand* v. *Banner*, 25 L.J. Q.B. 313; *The Eliza*, 3 Hagg. 87.

(2) *Stewart* v. *Greenock Marine Insurance Company*, 2 H.L.C. 159. See per Lord Blackburn; *Keith* v. *Burrows*, 2 A.C., p. 657.

(3) 1857, 8 Ell. and Bl. 493.

in the ship after abandonment, to be estimated at the current rate of freight as if brought from S. to Liverpool by another ship.

Where cargo taken in another vessel on abandonment.

Where, however, on the abandonment of a ship on the voyage, the cargo is taken to its destination in another vessel hired by the captain, the underwriters of the ship are not entitled to the freight due on the delivery of the cargo (1).

Liens on freight. Arrest of cargo.

A plaintiff entitled to proceed against the ship and freight may always arrest the cargo on board for freight: even if freight be not due, he will not therefore incur costs and damages (2). If the cargo belongs wholly to the owner of the ship, so that, technically speaking, no freight is payable, yet, as the cargo in such a case includes in itself the value of the freight, it is conceived that it may be arrested as security for such value (3). Any of the cargo on board liable to freight may be arrested as a security for the freight on the whole cargo (4). When freight is proceeded against, the cargo may be arrested simply as security for the freight that may be due (5).

PAYABLE BY WHOM

The person primarily liable for freight is the freighter or shipper, either upon his express contract by charter-party, or upon that which is implied from his bailment of the goods to be carried (6). The actual shipper is liable, although he is in fact acting only as agent for another, unless he made it clear that he shipped for his principal. In *Domatt* v. *Beckford* (7) it was held, follow-

(1) *Hickie* v. *Rodocanachi*, 28 L.J. Ex. 273. See also *Sea Insurance* v. *Hadden*, 13 Q.B.D. 706.

(2) *The Flora*, L.R. 1 A. and E. 45.

(3) See *The Riby Grove*, 2 W. Rob. 60.

(4) *The Roecliff*, L.R. 2 A. and E. 363.

(5) *The Lady Durham*, 3 Hagg. 200; *The Victor*, Lush. 72; *The Leo*, 31 L.J. Ad. 78; *The Orpheus*, L.R. 3 A. and E. 308. See *Stewart* v. *Rogerson*, L.R. 6 C.P. 424.

(6) *Fox* v. *Nott*, 30 L.J. Ex. 259; *Cawthron* v. *Trickett*, 33 L.J. C.P. 182; *Dickenson* v. *Lano*, 2 F. and F. 180.

(7) 2 N. and M. 374.

ing *Shepard* v. *De Bernales* (1), that the consignor is liable for freight, although by the bill of lading the goods are to be delivered to the consignee, *he paying freight for the same*, and they are delivered to the consignee without payment being required (2).

The Bills of Lading Act 1855 recites that, "by the custom of merchants a bill of lading of goods being transferable by indorsement, the property in the goods may thereby pass to the indorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner"; and by section 2 enacts that nothing in the Act should prejudice any right to claim freight against the original shipper or owner.

When goods are shipped to the order of the shipper, the custom of charging the person in whose name goods are entered at the custom-house with freight can only exist when the same person is consignee, or where the consignee is unknown (3).

Where receiver of goods is only an agent.

If the shipowner or master has notice that delivery is being taken on behalf of someone else than the actual receiver, the mere receipt of the goods is not sufficient to imply that that receiver promises to pay the freight personally (4). But an implied undertaking by one who receives the goods, to pay the freight, may be inferred from the mere receipt, although he has not presented any bill of lading, or asked for delivery, if the course of business between the parties on previous occasions has been for him to receive the goods consigned to him and pay the freight on them (5).

The shipowner may, however, lose his right of recourse to the shipper by giving credit to the consignee. Where the master, for example, instead of requiring payment of the freight in cash, takes a bill of exchange

(1) 13 East. 565.

(2) See also *Strong* v. *Hart*, 6 B. and C. 160; *Great Western Railway Company* v. *Bagge*, 15 Q.B.D. 625.

(3) *Artaza* v. *Smallpiece*, 1 Esp. 23.

(4) *Ward* v. *Felton*, 1 East. 507; *Amos* v. *Temperley*, 8 M. and W. 798.

(5) *Coleman* v. *Lambert*, 5 M. and W. 502; *Wilson* v. *Kymer*, 1 M. and S. 157; *Moorsom* v. *Kymer*, 2 M. and S. 303.

from the consignee, for his own convenience, when he might have got cash, the shipper will be discharged from further liability (1).

Liability of a person receiving goods under a bill of lading.

A person who presents a bill of lading, and takes delivery of the goods under it, may become liable to pay the freight. But the question is one of fact in each case. A promise will generally be inferred, where nothing has been done to qualify the effect of the receipt, but it is not implied as a matter of law (2).

Effect of Bills of Lading Act.

The Bills of Lading Act 1855 imposes upon the consignee or indorsee of the bill of lading the liability to pay freight, if the property in the goods has passed to him (3). But where the bill of lading represents that the freight, or some part of it, has been paid, the shipowner cannot, as against an assignee of the goods, who has given value for them on the faith of that representation, assert afterwards that it has not been paid. He cannot sue the assignee for that freight or set up a lien for it as against him. Goods being shipped in India for London, on account of a person there, the bill of lading was forwarded to him, and he indorsed it over for value. The bill of lading, signed by the captain, stated the freight to have been paid in Bengal; but it was found, after the above transfer, that the freight had never been paid, through default of the shipper. It was held that the shipowners, who detained the goods, could not claim payment of the freight from the assignees of the bill of lading. The brokers employed by these latter parties sold the goods, but when called upon for delivery, found them to be stopped for freight, which, to obtain possession of the property, they paid, although their principals had formerly directed them not to do so, as the freight had been paid in Bengal.

(1) *Strong* v. *Hart*, 6 B. and C. 160.

(2) *Sanders* v. *Vanzeller*, 12 L.J. Ex. 497; *Moller* v. *Young*, 20 L.J. Q.B. 94; *Furness* v. *White* (1895), A.C. 40; *Kemp* v. *Clark*, 12 Q.B. 647; *Stindt* v. *Roberts*, 12 Jur. 518.

(3) See *Weguelin* v. *Cellier*, L.R. 6 H.L. 280; *Neish* v. *Graham*, 27 L.J. Q.B. 15; *Drew* v. *Bird*, M. and M. 156; *Schmidt* v. *Tiden*, 43 L.J. Q.B. 199; *Schack* v. *Anthony*, 1 M. and S. 573; *Collier* v. *Hinde*, 17 L.T. 341; *Long* v. *Young*, 2 L.J. (O.S.) Ch. 139; *Davenport* v. *Whitmore*, 6 L.J. Ch. 58; *Swann* v. *Barber*, 5 Ex. D. 130; *Nochells* v. *Lingham*, 2 Jur. 438.

It was held that this advance by the brokers was made in their own wrong, though the freight had not in fact been paid in Bengal, as the principals supposed (1).

Liability for charter-party freight.

The charterer is liable for the charter-party freight, unless the contrary is clearly expressed. If the

Assignments of charter.

charterer assigns the benefit of the charter, the liability of the original charterer depends upon whether or not the shipowner has accepted the assignee as the contracting party in his place (2).

Cesser clause.

A clause is often inserted in charter-parties known as a cesser clause, to the effect that the charterer's liability for the payment of freight, and other subsequent performance of the charter-party, shall cease when the cargo has been shipped, and that the shipowner shall look to the shippers or owners of the cargo, enforcing it by means of a lien expressly given to the shipowner.

Notwithstanding that a charter-party provides that the liabilities of the charterer are to cease on the vessel being loaded, "the master and owner having a lien on the cargo for all freight and demurrage under this charter-party," the liability of the charterer to pay the charter-party freight will continue after the vessel is loaded, if the charter-party enables bills of lading to be presented in such a form as to make the owner's lien not commensurate with the liability which is to cease (3).

In *Broadhead* v. *Yule* (4), on the ship's arrival the charterers' agent, to whom the ship was addressed, collected the freight from consignees on delivery of the goods, and, without authority from master or owner, compromised a claim for damage to a butt of wine by a money payment. It was held that he must account for the full freight to the shipowner.

(1) *Howard* v. *Tucker*, 1 B. and Ad. 712; *Tamvaco* v. *Simpson*, 34 L.J. C.P. 268; *Pinder* v. *Wilks*, 5 Taunt. 612. See *Renteria* v. *Ruding*, M. and M. 511.

(2) *Christy* v. *Row*, 1 Taunt. 300; *Shepard* v. *De Bernales*, 13 East. 565; *Dimech* v. *Corlett*, 12 Moo. P.C. 199, p. 223.

(3) *Hansen* v. *Harrold*, 63 L.J. Q.B. 744.

(4) 9 Ct. of Sess. Cas. (3rd ser.) 921.

CHAPTER VII

LIEN FOR FREIGHT

THE shipowner generally has a right to retain the goods in his possession until the freight upon them, and sometimes other charges also, have been paid. This right is termed a lien. It does not give the shipowner any property in the goods, so that he cannot sell them, even though the retention of them may be attended with expense (1). This right avails against the true owner of the goods, although he may not be the person liable for the freight or other charges.

At common law.

The shipowner has at common law a lien for freight properly so called; but for money payable in advance, though often designated by that name, as it is not freight, there is no such lien. Whether the goods are carried under a charter-party or in a general ship, the shipowner may retain them until the freight upon them is paid (2). Lord Tenterden (3) said, that the shipowner could not detain cargo that had been actually carried for a breach of a covenant to furnish a full cargo, nor for demurrage, nor for pilotage or port charges. Since Lord Tenterden wrote, the Privy Council have decided, in the cases of *How* v. *Kirchner* (4) and *Kirchner* v. *Venus* (5), that the freight for which the shipowner can exercise this lien is confined to freight strictly so called. In both cases goods had been

(1) *Mulliner* v. *Florence*, 3 Q.B.D. 484; *Thames Ironworks Company* v. *Patent Derrick Company*, 29 L.J. Ch. 714; *Drinkwater* v. *The Brig Spartan*, cited in Parsons, Shipping, vol. i. pp. 174–177.

(2) Anonymous, 12 Mod. 447.

(3) Abbott, 5th Edit., p. 171.

(4) 1857, 11 Moore, P.C. 21.

(5) 1859, 12 Moore, P.C. 361.

shipped in Great Britain for Sydney under bills of lading by which the freight was made payable in Liverpool one month after sailing, vessel lost or not lost, the only distinction being that in *How* v. *Kirchner* it was provided that freight was payable by "the shippers," while in *Kirchner* v. *Venus* the bill of lading did not expressly name the person liable to pay. In both cases the shipowner, not having been paid, tried to stop the goods at Sydney for freight, but in both it was held that the sum agreed to be paid for carriage did not come within the legal definition of freight. Their lordships held that, as the shipowner, instead of trusting to the lien given him by law with respect to freight, had made a special contract for a payment which was not freight, it must depend on the terms of that contract whether a lien did or did not exist, and as the bill of lading did not give him a lien, the law would not supply one by implication (1).

Where no lien at common law, it can only arise by contract.

The right to lien for freight is confined to the freight payable on the particular shipment of goods. A shipowner cannot retain the goods for other freights due from their owner upon other transactions, unless an agreement to that effect has been made expressly, or unless such an agreement must be inferred from the course of business between the parties, or from a general usage in the trade. Where no lien exists at common law, it can only arise by contract with the particular party, either express or implied. It may be implied from previous dealings between the same parties upon the footing of such a lien, or even from a usage of the trade so general as that the jury must reasonably presume that the parties knew of and adopted it in their dealing. But where, as in the case of a common carrier claiming a lien for his general balance, such a lien is against the policy of the common law and the custom of the realm, which only gives him a lien for the carriage-price of the particular goods, there ought to be very strong evidence of a general usage for such a lien to induce a jury to infer the knowledge

(1) 1859, 12 Moore, P.C. 361, at p. 398.

and adoption of it by the particular parties in their contract (1).

Where there can be no lien.

There cannot be a usage entitling a carrier to retain goods as against consignees to whom they belong, for debts due to him from the shipper (2).

A usage for carriers to retain goods as a lien for a general balance of account between them and the consignees cannot affect the right of the consignor to stop the goods in transit. It would seem that such a lien could not be established even by agreement between the carrier and the consignee (3).

If the owner of a ship covenant by charter-party to let her to freight, and deliver the cargo in good order and condition, and the freighters covenant to pay freight on safe delivery of the cargo, one-third in cash and the remaining two-thirds by approved bills of exchange at four months, the delivery of the cargo and payment of freight are concomitant acts, and the owner has a lien on the cargo till he is satisfied for the amount of freight remaining due (4).

By a charter-party freight was agreed to be paid for the use or hire of the ship at a certain rate per ton, for a voyage out and home, in manner following, viz., a certain sum in advance on the ship's clearing outwards, and the residue half in cash and half in approved bills upon the delivery of the homeward cargo; the owner also appointed C. S. master, at the request of the charterer, who executed a bond, conditioned for the faithful performance of the master's duty; and the owner expressly instructed C. S. to be careful to sign all bills of lading with the clause, "freight payable as per charter-party." The ship was consigned to C. & Co. in Calcutta, by whom she was put up, for her homeward voyage, as a general ship, and different merchants

(1) *Rushforth* v. *Hadfield*, 1806, 7 East. 224. *Cf. Crawshay* v. *Homfray*, 4 B. and A. 50.

(2) See *Wright* v. *Snell*, 5 B. and Ald. 350; *Butler* v. *Woolcot*, 2 Bos. and P. N.R. 64; *Leuckhart* v. *Cooper*, 3 Bing. N.C. 99.

(3) *Oppenheim* v. *Russell*, 1802, 3 B. and P. 42.

(4) *Yates* v. *Railston*, 1818, 2 Moore 294. See also *Yates* v. *Mennell*, 1818, 2 Moore 297.

shipped goods by her, C. & Co. taking for homeward freight bills payable sixty days after delivery of the cargo; and a new master having been appointed by C. & Co., in conjunction with C. S., signed bills of lading with the clause, "paying freight agreeable to freight bill." The freight bills were made payable in London to B. & Co., to whom the charterer was indebted for advances on the outward cargo, and who, as well as C. & Co., were cognisant of the terms of the charter-party. It was held that the owner of the ship had a lien on these goods to the extent of the homeward freight. C. & Co. also put on board the ship goods purchased by them on account of the charterer; but he being indebted to them, and B. & Co., their agents, those goods were, by the bill of lading, consigned to B. & Co. It was held that, as between the owner of the ship and B. & Co., the goods were to be considered as the goods of the charterer and liable to the owner's lien on them for the freight due by charter-party. In the charter-party the freighter promised to pay and defray two-thirds of the port charges. The owner having paid the whole, was held to have no lien on the goods shipped for those charges (1).

Where freight is paid to the master.

The question whether shipowners are, when the bill of lading freight is paid to the master, entitled as against the charterer to collect and receive it, is one of fact, depending upon the documents and circumstances in each case. The apparent conflict in the authorities arises mainly from the fact that the documents and circumstances are different in different cases. There are certain more or less typical cases. For instance, there is the case, very often referred to, but in practice rather uncommon, where the charter-party amounts to what is called a demise of the vessel. In such a case it is reasonably clear that the contract with the shippers under the bill of lading is between them and the charterers, and not between them and the owners.

(1) *Faith* v. *East India Company*, 1821, 4 B. and Ald. 630. See also *Campion* v. *Colvin*, 1836, 3 Bing. N.C. 17. See *Black* v. *Rose*, 1864, 2 Moore P.C. N.S. 277; *Moller* v. *Young*, 24 L.J. Q.B. 217; *Gardner* v. *Trechmann*, 15 Q.B.D. 154.

Again, there is another class of cases in which the charterers by the charter-party do no more than undertake that a full cargo shall be shipped, and guarantee payment of a certain freight. In such cases it is very often stipulated that upon shipment of a full cargo, and upon the charterers paying or securing payment in the manner agreed upon of the excess (if any) of chartered freight over and above the bill of lading freight, the charterers' liability under the charter-party is to cease. In such cases the contract of carriage under the bill of lading would ordinarily be between the owners and the shippers. But even in cases of this kind it is scarcely safe to lay down a hard-and-fast rule. The circumstances and terms of the documents may differ in different cases belonging to this class. And between the two types or classes there is a great variety of intermediate cases (1).

Goods on which lien may be enforced.

A master who has delivered a portion of a cargo on payment of a sum on account of freight, may detain the balance of the cargo for the balance of the freight (2).

Double claim: one right, the other wrongful.

If a master claims a lien for goods for two different causes, as to the one claim rightful, and as to the other wrongful, he does not, by making this double claim, dispense with a tender of the amount of the rightful claim. But if he so conducts himself as to indicate that such a tender would be nugatory, he dispenses with the tender (3).

Delivery of part does not defeat lien upon remainder.

Where several goods, belonging to one owner, are carried on the same voyage, a delivery of part does not defeat the lien upon the remainder for the whole freight. But if there be two contracts to carry, with different termini to the voyage in each contract, no lien attaches for freight under the one contract, upon goods shipped under the other and improperly detained on board by

(1) *Samuel* v. *West Hartlepool Steam Navigation Company*, 11 Com. Cas. 115; 12 Com. Cas. 203.

(2) *Peres* v. *Alsop*, 1862, 3 F. and F. 188.

(3) *Kerford* v. *Mondel*, 1859, 28 L.J. Ex. 303; *Scarfe* v. *Morgan*, 4 M. and W. 270; *Askmole* v. *Wainwright*, 2 Q.B. 837; *The Norway*, 12 L.T. 57; *Jones* v. *Tarleton*, 9 M. and W. 675; *The Energie*, L.R. 6 N.C. 306.

the carrier. Goods are divested of a lien by a complete delivery, and it is for the jury to say whether there has been a complete delivery (1).

In *Thorsen* v. *M'Dowall* (2) the freight was payable "after unloading," and it was held that the shipowner could not properly stop the discharge until the freight on the goods still in the ship was paid.

How lien given.

The lien is often given by a general clause that the shipowner is to have "an absolute lien on the cargo for the recovery of all freight, dead freight, and demurrage." Such a clause covers all freight payable during the voyage, so that the lien may attach to outward cargo for the charter freight, or part of it, although it may be agreed that that shall be calculated upon the homeward cargo (3).

Stipulated lien may be lost by giving inconsistent bill of lading.

Even where a shipowner has been careful to retain a lien by a charter-party, his object may be frustrated by his master giving bills of lading inconsistent with the retention of the lien. It frequently happens that ships let by charter-party are again sublet by the charterers, or put up by them as general ships, and when the shipowner seeks to avail himself of the lien he has retained by the charter-party for the chartered freight, he is met by the cargo owners producing bills of lading entitling them to their cargo on payment of something less. In all such cases the shipowner's lien is restricted to the amount of the bill of lading freight, unless the holder of the bill of lading is identified with the charterer, or unless, perhaps, in some cases, the master, in giving the bills of lading, was acting outside the scope of his authority (4).

A ship is chartered for a particular voyage for a gross sum by way of freight. The captain signs bills of lading for the cargo (which is the property of and con-

(1) *Sodergren* v. *Flight*, cited in argument in *Hanson* v. *Meyer*, 6 East. p. 622. But *cf.* *Bernel* v. *Pim*, 1 Gale 17.

(2) 19 Sess. Cas. (4th ser.) 743. (3) *Gilkison* v. *Middleton*, 26 L.J. C.P. 209.

(4) See *Paul* v. *Birch*, Abbott, 5th Edit., pp. 171, 172; *Faith* v. *East India Company*, 1821, 4 B. and Ald. 630; *Small* v. *Moates*, 1833, 9 Bing. 574, 591; *Fry* v. *The Chartered Mercantile Bank*, 1866, 1 C.P. 689; *Foster* v. *Colby*, 1858, 28 L.J. Ex. 81; *Shand* v. *Sanderson*, 1859, 28 L.J. Ex. 278.

signed to a third person), specifying a rate of freight amounting to a less sum than that mentioned in the charter-party. It was held that the owner had no lien on the cargo beyond the freight specified in the bills of lading (1).

But the holder of a bill of lading cannot obtain the cargo if his possession of that document is as agent for the charterer, without first satisfying the shipowner's lien for freight due under the charter-party (2). Nor does the fact that the charterer is indebted to the agent, and has sent him the bill of lading that he may realise the goods and use the proceeds to discharge the debt, put the agent in the position of an indorsee for value (3).

Shipper with notice cannot bind owner by unauthorised bill of lading.

But if a shipper of cargo presents bills of lading in a form which he knows the master has no authority to agree to, he cannot, by inducing the master to sign them, obtain a contract which shall be valid in his own favour against the shipowner (4).

Bona-fide transferee may.

Mr Justice Willes, in *Pearson* v. *Goschen*, said that, if the bills had got into the hands of a *bona-fide* holder for value, there was no doubt that, as between such holder and the shipowner, the payment of freight at the bill of lading freight only could have been enforced (5).

Need an indorsee of a bill of lading make inquiries?

There may be some cases in which an indorsee of a bill of lading is, by the form of the instrument, put on inquiry. But the Court of Appeal, in *Manchester Trust* v. *Furness* (6), held that a reference to a charter-party in a bill of lading did not give the holders constructive notice of the contents of the charter-party. In their view the equitable doctrine of constructive notice of contents of documents was not applicable to mercantile transactions (7).

(1) *Mitchell* v. *Scaife*, 4 Camp. 298.

(2) *Gledstanes* v. *Allen*, 1852, 12 C.B. 202; *Kern* v. *Deslandes*, 1861, 30 L.J. C.P. 297.

(3) *Ibid.* See also *Faith* v. *East India Company*, 1821, 4 B. and Ald. 630.

(4) *Faith* v. *East India Company*, 4 B. and Ald. 630; *Pearson* v. *Goschen*, 1864, 33 L.J. C.P. 265.

(5) See also the judgment of the same judge in *Chappell* v. *Comfort*, 1862, 31 L.J. C.P. 58.

(6) 1895, 2 Q.B. 539.

(7) See also judgments of Barons Bramwell, Watson, and Channell in *Foster* v. *Colby*, 1858, 28 L.J. Ex. 81. See per Lord Esher in *Leduc* v. *Ward*, 1888,

The shipowner's lien for freight is not lost by the master giving bills of lading by which the freight is made payable to third persons, as the master has no authority to give such bills of lading (1).

Chartered ship put up as general ship.

If a chartered ship be put up as a general ship, the shipowner cannot detain the goods of shippers, who have no notice of the charter-party, for freight due under that instrument. C. & Co., who chartered a foreign vessel under a charter-party, which provided that the captain should have a lien on the cargo for freight, dead freight, and demurrage, advertised the vessel as a general ship, the advertisement inviting applications as to the freight, etc., to be made "to C. & Co., brokers." The plaintiffs entered into an agreement with C. & Co. for the carriage of certain goods at a certain rate of freight, and put the goods on board without notice of the charter-party. The captain refused to sign the bills of lading, except subject to the charter-party, and claimed a lien on goods for expenses. It was held that the plaintiffs were not bound by the charter-party, as they had no notice of it when they put the goods on board, and that they were entitled to have the goods returned to them free from any claim by the captain. It was further held that, as the vessel was advertised as a general ship, the plaintiffs were not bound to inquire whether it was subject to a charter-party or not (2).

Charter giving possession to charterer.

An owner cannot detain goods for unpaid freight under the charter where he gives up possession and control of the ship to the charterer, for he has not possession of the goods. The owner of a vessel has no lien for the hire stipulated by charter-party for the voyage on the goods shipped by the charterer; because the latter is the owner of the ship for the voyage, and

20 Q.B.D., p. 479; see *Grant* v. *Norway*, 1851, 20 L.J. C.P. 93; per Lord Esher in *Cox* v. *Bruce*, 1886, 18 Q.B.D., pp. 151, 152; *Mitchell* v. *Scaife*, 1815, 4 Camp. 298; *Howard* v. *Tucker*, 1831, 1 B. and Ad. 712; *Gardner* v. *Treckmann*, 1884, 15 Q.B.D. 154.

(1) *Reynolds* v. *Jex*, 1865, 34 L.J. Q.B. 251.

(2) *Peek* v. *Larsen*, 1871, L.R. 12 Eq. 378; *The Stornoway*, 1882, 4 Asp. M.C. 529; *Tharsis Sulphur and Copper Mining Company* v. *Culliford*, 22 W.R. 46. *Cf. Ralli* v. *Paddington S.S. Company*, 5 Com. Cas. 124.

the first owner has no possession of the ship or goods, without which there can be no lien (1). But, of course, a lien for the freight may be expressly given by the charter-party (2).

No lien where voyage is abandoned.

The lien given by a charter-party, for the charter freight, does not attach for a part of the freight made payable on signing bills of lading, where the voyage is entirely given up, and the bills of lading are not signed. By a charter-party, after providing that the freight was to be at certain specified rates, it was agreed that £250 should be advanced in cash on signing bills of lading and clearing at the Custom House of the port of shipment, and the remainder on a true and faithful delivery of the cargo at the port of discharge; and that for the security and payment of all freight, dead freight, demurrage, and other charges, the master or owners should have an absolute lien and charge on the cargo. The loading of the ship was completed, and the ship was cleared, but she never started on her voyage, nor were the bills of lading signed. The charterer filed a liquidation petition, and the trustee under the liquidation disclaimed all interest under the charter-party. It was held by the Appeal Court in Bankruptcy that the shipowner was not entitled to a lien in respect of the £250 agreed to be paid in advance, inasmuch as the ship had never earned freight; the compensation to which the shipowner was entitled for the loss sustained by reason of the charterer's default was not freight, and the £250 did not come within the lien given by the charter-party (3).

In *Nelson* v. *Association for the Protection of Commercial Interests, etc.* (4), by the bill of lading freight was to be paid at the port of discharge by the consignees, ship lost or not lost. The ship was lost in the

(1) *Belcher* v. *Capper*, 4 M. and G. 502. *Cf. Christie* v. *Lewis*, 2 B. and B. 410; *Hutton* v. *Bragg*, 7 Taunt. 14.

(2) *Small* v. *Moates*, 9 Bing. 574. *Cf. The Stornoway*, 4 Asp. M.C. 529.

(3) *Ex parte Nyholm, in re Child*, 43 L.J. Bk. 21. *Cf. Thompson* v. *Small*, 1 C.B. 328; *The Blenheim*, 10 P.D. 67.

(4) 1874, 43 L.J. C.P. 218. See also *The Edward Cardwell*, 12 L.T. 677; *Lowther* v. *Belfast Harbour Company*, 17 Ir. Ch. R. 54.

course of the voyage. The shipowners abandoned the voyage and made no attempt to salve either ship or cargo; but the defendants, who were employed by the underwriters of the cargo, saved a large portion of the cargo and brought it home. In these circumstances, it was held that the shipowners could not claim freight from the defendants. Lord Esher said (1): "If the shippers were bound to pay the freight, whether the ship was lost or not lost, there was no lien at all, for the right to lien does not arise unless the payment of the freight is to be on the delivery of the cargo; if the freight is payable without delivery of the cargo, lien does not accrue" (2).

No lien if cargo to be delivered before payment.

A shipowner may show an intention to give up his lien for freight where he agrees that the delivery of the cargo shall precede the payment of freight. The onus of showing that the shipowner has so contracted away his right of lien is on the merchant.

In *Saville* v. *Campion* (3) it was covenanted by charter-party that the owner should receive on board, in London, all such goods as the freighter thought fit to load, and should proceed therewith to Madras; and there, after delivering her outward cargo, receive from the freighter's agents a homeward cargo, and deliver the same in London; and that all the cabins but one, which was reserved for the use of the captain, should be at the disposal of the freighter, who was to appoint a supercargo, to superintend the storage of the goods, freight to be paid at so much per ton on the register tonnage of the ship. The captain and crew were employed and paid by the owner. £500 was to be paid in cash at the expiration of six months from the date of the charter-party; a moiety of the remainder by bills at two months after date from the day on which the ship should arrive in the Thames, on her return from her homeward voyage; and the residue by bills at four months' date from the same period. The charterers became bankrupt,

(1) 1874, 43 L.J. C.P., p. 227.

(2) See also *The Teutonia*, L.R. 4 P.C. 171, and per Cockburn, C.J., in *Matthews* v. *Gibbs*, 30 L.J. Q.B., p. 63.

(3) 1819, 2 B. and Ald. 503.

and neither they nor their assignees tendered the bills for the freight. In an action by the assignees for the goods, Lord Tenterden held that the shipowner was entitled to retain them until payment, "there being nothing to show that the delivery of the goods was to precede the payment of the hire"; and his lordship added: "The decision of the Court was agreeable to the nature of the contract that a prudent shipowner would make on such an occasion. For it would certainly be an act of imprudence on the part of a shipowner to enter into a contract which might have the effect of employing his ship for a long time, and at great expense to himself, without any remuneration, if the person with whom he contracted should happen to fail before the termination of the voyage" (1).

Freighters becoming bankrupt.

By a charter-party it was stipulated that the vessel should proceed from London to Bombay, and being there loaded, should proceed to London, and discharge in any dock the freighters might appoint, and deliver the cargo "on being paid freight at and after the rate of £4 per ton, to be computed," etc., the act of God, etc., always excepted. "The freight to be paid on unloading and right delivery of the cargo, in cash, two months after the vessel's inward report at the Custom House." The vessel having arrived at Bombay, and having been there loaded, sailed homeward; but before her arrival in the Thames the freighters became bankrupt. On the arrival of the vessel in St Katherine's Docks, it was reported at the custom house and her cargo landed. The assignees of the bankrupts immediately required the goods to be delivered to them, without payment of freight to the shipowner, who claimed a lien on the cargo; and, on the defendants refusing to deliver the goods, paid the amount of the freight, under protest, and brought the present action to recover it. It was held that, by the terms of the charter-party, freight was not payable until two months after the

(1) See also *Foster* v. *Colby*, 28 L.J. Ex. 81; *Tate* v. *Meek*, 8 Taunt. 280; *Lucas* v. *Nockells*, 4 Bing. 729.

inward report, and therefore the shipowner had no lien on the cargo for freight (1).

No lien on charterer's goods unless freight due or express lien.

A shipowner cannot detain the goods even of the charterer for freight which is not already due unless a lien be given on them by the charter-party. If the charterer demand their re-delivery at the port of loading, the shipowner must give them up; he has no right in such a case to insist on carrying them to their original destination (2), unless bills of lading have been given by the master for the goods, and have got into the hands of third persons.

Bona-fide transferee cannot bind shipowner by everything in bill of lading.

There is some difference of opinion as to the responsibility of shipowners towards holders of bills of lading who have taken the same in good faith and for value, where the master has exceeded his authority in giving the bills of lading. If the master gives a bill of lading for goods which have not been shipped, it seems to have been well settled, ever since *Grant* v. *Norway* (3), that his owner is not responsible; but if he alters his owner's contract, and agrees to carry cargo at a lower freight than his owner stipulated for, this contract, though undoubtedly unauthorised, binds his owner (4).

Lien on cargo for freight of chartered ship.

It was held in *Tamvaco* v. *Simpson* (5) that, if the shipowner takes the charterer's acceptance as a prepayment of freight, or as an advance on account of it, the shipowner's lien on the cargo for freight is, at the least, suspended *pro tanto*. It will be thus seen that a shipowner may limit or contract away the lien given him by the common law. He may also stipulate for a more extensive protection. Lord Tenterden said (6): "A

(1) *Alsager* v. *St Katherine's Dock Company*, 1845, 15 L.J. Ex. 34.

(2) *Thompson* v. *Small*, 1845, 14 L.J. C.P. 157; *Davidson* v. *Gwynne*, 12 East. 381.

(3) 1851, 20 L.J. C.P. 93.

(4) See *M'Lean* v. *Fleming*, 1871, L.R. 2 H.L. (Sc.) 128; *Brown* v. *Powell Duffryn*, etc. (1875), L.R. 10 C.P. 562; *Cox* v. *Bruce*, 1886, 18 Q.B.D. 147, 151; *Mitchell* v. *Scaife*, 1815, 4 Camp. 298; *Gardner* v. *Trechmann*, 15 Q.B.D. 154; *Howard* v. *Tucker*, 1831, 1 B. and Ad. 712; *Fry* v. *Chartered Mercantile Bank*, 1866, L.R. 1 C.P. 689; *Shand* v. *Sanderson*, 1859, 28 L.J. Ex. 178; *Leduc* v. *Ward*, 1888, 20 Q.B.D. 475; *Place* v. *Potts*, 5 H.L. Cas. 383; *Wilkinson* v. *Sharland*, 10 Ex. 724.

(5) 1866, 19 C.B. N.S. 453. (6) Abbott, 5th Edit., p. 171.

lien may be extended further, or wholly excluded, by particular contract or special circumstances."

Lien for hire in time-charter.

In the case of a time-charter in the ordinary form, not operating as a demise of the ship, the contracts contained in bills of lading are made with the shipowner and not with the charterer, notwithstanding that, by the terms of the time-charter, the captain is to be under the orders and direction of the charterer as regards agency, employment, and other arrangements. Agents appointed by the charterer or his sub-charterers to collect freight due under bills of lading collect the same on behalf of all parties concerned, including the shipowner having a lien on cargoes and sub-freights for hire due and unpaid under the time-charter. A shipowner having such a lien, who claims the freight from the agent before the latter has paid it to or allowed it in account with the charterers, has a right to have paid to him an amount equal to the amount of hire presently due to him and unpaid for which he has the lien. Any further sum received by him as freight from the agents he holds to the use of the charterers. It would seem that the shipowner who receives freight from the agent has no right to hold it as security for hire accruing due. By the terms of a time-charter the hire of the ship was payable half-monthly in advance. In default of payment the owner was to have the faculty of withdrawing the ship from the service of the charterer without prejudice to any claim he might have against the charterer under the charter-party. The owner was also to have a lien upon all cargoes and sub-freights for any amounts due under the charter. It was held that, after exercising his right of withdrawing the ship from the service of the charterer, the owner could not exercise his lien on sub-freights to enforce payments of hire alleged to be due for the use of the ship after the date of the withdrawal (1).

Lien on sub-freights.

A lien upon "sub-freights" for charter freight or

(1) *Wehner* v. *Dene Steam Shipping Company*, 74 L.J. K.B. 550; (1905) 2 K.B. 92; 10 Com. Cas. 139; *Gilkison* v. *Middleton*, 26 L.J. C.P. 209, followed; *Marquand* v. *Banner*, 25 L.J. Q.B. 313, questioned.

hire entitles the shipowner to require payment to himself of freights which may be due to the charterer. But such a lien can only be exercised before the sub-freight has been paid to the charterer of the ship or his agent. The lien confers no right on the shipowner to follow the sub-freight after it has been paid (1).

Express lien for dead freight.

The shipowner has no lien at common law for dead freight, but such a lien may be given by usage or express contract. The agreed lien covers an unliquidated claim to compensation, although the damages may have to be calculated, and though the calculation may be difficult (2).

When a lien for charter freight incorporated.

If the bill of lading incorporates the terms of the charter-party, as by using such comprehensive words as "paying freight for the same goods and all other conditions as per charter-party," the owner's lien on the goods for the charter freight is preserved (3). On the other hand, where the words used are "paying for the said goods as per charter-party," they are read to mean, paying for the particular goods at the rate mentioned in the charter-party; and the further liens given by the charter are not preserved against those goods, if they have passed to third persons (4).

Assignee of bill of lading entitled to goods free from lien.

An assignee for value of the bill of lading, to whom the contract in the bill of lading has passed, does not lose his right to have the goods free of liens of the shipowner, not expressly reserved in the bill of lading, merely because he has notice of the existence of the charter-party, nor because he obtains his title from the charterer himself (5).

(1) *Tagart, Beaton & Co.* v. *James Fisher & Sons*, 1903, 1 K.B. 391.

(2) *M'Lean* v. *Fleming*, 2 H.L. Sc. 128; *Phillips* v. *Rodie*, 15 East. 547; *Birley* v. *Gladstone*, 3 M. and S. 205. *Cf. Clink* v. *Radford* (1891), 1 Q.B. 625; *Hammond* v. *M'Crie*, 3 C.L.R. 1198.

(3) *Lamb* v. *Kaselack*, 19 Sc. L.R. 336; *Porteus* v. *Watney*, 3 Q.B.D. 223, 534; *Gray* v. *Carr*, L.R. 6 Q.B. 523; *Lockhart* v. *Falk*, 44 L.J. Ex. 105. *Cf. Serraino* v. *Campbell*, 25 Q.B.D. 501; *Wegener* v. *Smith*, 24 L.J. C.P. 25.

(4) *Smith* v. *Sieveking*, 24 L.J. Q.B. 257; affirmed 5 E. and B. 589; *Fry* v. *Chartered Mercantile Bank*, 1 C.P. 689.

(5) *Chappell* v. *Comfort*, 31 L.J. C.P. 58. And see per Lindley, L.J., in *Manchester Trust* v. *Furness* (1895), 2 Q.B., at p. 545; *Turner* v. *Gorlam*, (1904), A.C. 826. But *cf. Small* v *Moates*, 9 Bing. 579; *Kern* v. *Deslandes*, 30 L.J. C.P. 297.

Where the charter-party itself was made on behalf of the person to whom the bill of lading has been indorsed, though not in his name, he is bound by its terms, and the liens given by it (1). And this is so also where the indorsement of the bill of lading has been to one who is acting as agent for the charterer (2). Liens valid against factor of charterer.

The charterer of a vessel shipped goods on board under a bill of lading signed by the master, by which the goods were to be delivered to B. or his assigns, he or they paying freight for the said goods as usual. B. was the charterer's agent, and the charterer was indebted to him at the time of shipment for advances. The bill of lading was handed by the charterer to B., that B. might apply the proceeds of the goods in reduction of the debt. B. took the bill of lading with notice of the charter-party and its terms. It was held that, as B. was agent of the charterer with notice of the charter-party, he was not entitled to the goods without payment of the charter freight (3).

"In some cases charterers are by a charter-party entitled to call upon the master to sign bills of lading at any rate of freight, but only on condition that if the freight as per bills of lading should be less than the freight as per charter-party, the master should be paid the difference in advance. To avoid paying this difference at the time, charterers, who have undertaken to carry the goods of others for less than the chartered freight, have been known to give their own bills of lading to the shippers of cargo, and to take from the master one bill of lading, making the entire cargo deliverable to themselves on payment of the freight as per charter-party. In such a case the shipowner may have done nothing to part with his lien for freight as per charter-party, except that he has put the charterers in a position to invite third persons to ship goods on board his ship on the customary terms. If a shipper had agreed with the charterer to pay freight at the Bills of lading given by charterer, when binding on shipowner.

(1) *M'Lean* v. *Fleming*, L.R. 2 H.L. Sc. 128.

(2) *Gledstanes* v. *Allen*, 12 C.B. 202; *West Hartlepool S. Navigation Company* v. *Tagart*, 19 T.L.R. 251.

(3) *Kern* v. *Deslandes*, 6 L.T. 349.

current rate, on delivery of his goods at the port of discharge, it seems probable that the shipowner would not have a lien for any greater amount (1); but, if the shipper's bill of lading purported to make the goods deliverable on payment of a nominal freight, or represented that the freight had been paid at the port of loading, it would probably be held that, if the shipper wished to bind the shipowner by such a contract, he must produce a bill of lading signed by the master, or by some other person who had been held out by the shipowner as having authority in that behalf, or who was in fact duly authorised" (2).

Shipowne must keep possession of goods.

If goods are conveyed in pursuance of a charter-party, the right of detention for the freight may depend upon the terms of the particular contract. Where there is no special contract, as in the case of a general ship, the master is not bound absolutely to part with the possession of any part of his cargo until the freight and other charges due in respect of such part are paid. The master may detain any part of the merchandise for the freight of all that is consigned to the same person (3). If the master once parts with the possession out of the hands of himself and his agents, he loses his lien or hold upon the goods, and cannot afterwards reclaim them (4). If the master lands his goods at any particular wharf or dock, in obedience to an Act of Parliament, he does not thereby part with his lien (5).

Lien for freight on landing goods.

Section 494 of the Merchant Shipping Act 1894 enacts that: "If at the time when any goods are landed from any ship, and placed in the custody of any person as a wharfinger or warehouseman, the shipowner gives to the wharfinger or warehouseman notice in writing

(1) See the remarks of Lord Hardwicke in *Paul* v. *Birch*, 1743, 2 Atk. 621; *Tharsis Sulphur Company* v. *Culliford* (1873), 22 W.R. 46; *The Stornoway* (1882), 4 Asp. M.C. 529.

(2) Abbott, 14th Edit., p. 367.

(3) *Sodergren* v. *Flight*, Guildhall, Trinity Term, 1796, before Lord Kenyon, C.J., quoted 6 East. 622.

(4) *Mors le Blanch* v. *Wilson*, 1873, 42 L.J. C.P. 70, 76; *The Cato*, 1881, 7 P.D. 5; *The Arno* (1895), 8 Asp. M.C. 4.

(5) *Wilson* v. *Kymer* (1813), 1 M. and S. 157. See also *The Clan Macdonald* (1883), 5 Asp. M.C. 148.

that the goods are to remain subject to a lien for freight or other charges payable to the shipowner to an amount mentioned in the notice, the goods so landed shall, in the hands of the wharfinger or warehouseman, continue subject to the same lien, if any, for such charges as they were subject to before the landing thereof, and the wharfinger or warehouseman receiving those goods shall retain them until the lien is discharged as hereinafter mentioned, and shall, if he fails so to do, make good to the shipowner any loss thereby occasioned to him."

Section 495 enacts that "The said lien for freight and other charges shall be discharged (*a*) upon the production to the wharfinger or warehouseman of a receipt for the amount claimed as due, and delivery to the wharfinger or warehouseman of a copy thereof or of a release of freight from the shipowner, and (*b*) upon the deposit by the owner of the goods with the wharfinger or warehouseman of a sum of money equal in amount to the sum claimed as aforesaid by the shipowner; but in the latter case the lien shall be discharged without prejudice to any other remedy which the shipowner may have for the recovery of the freight" (1).

Provisions as to deposits by owners of goods.

Section 496 enacts that "(1) When a deposit as aforesaid is made with the wharfinger or warehouseman, the person making the same may, within fifteen days after making it, give to the wharfinger or warehouseman notice in writing to retain it, stating in the notice the sums, if any, which he admits to be payable to the shipowner, or, as the case may be, that he does not admit any sum to be so payable; but if no such notice is given, the wharfinger or warehouseman may, at the expiration of the fifteen days, pay the sum deposited over to the shipowner.

"(2) If a notice is given as aforesaid, the wharfinger or warehouseman shall immediately apprise the shipowner of it, and shall pay or tender to him, out of the

(1) If the shipowner would otherwise have had no claim for freight against any person, the fact that such a person has deposited money with the warehouseman, and taken out the goods, does not give the shipowner any right to claim freight from him, apart from his claim against the sum deposited (*White* v. *Furness*, 1905, A.C. 40).

sum deposited, the sum, if any, admitted by the notice to be payable, and shall retain the balance; or, if no sum is admitted to be payable, the whole of the sum deposited, for thirty days from the date of the notice.

"(3) At the expiration of those thirty days, unless legal proceedings have in the meantime been instituted by the shipowner against the owner of the goods to recover the said balance or sum, or otherwise for the settlement of any disputes which may have arisen between them concerning the freight or other charges as aforesaid, and notice in writing of those proceedings has been served on the wharfinger or warehouseman, the wharfinger or warehouseman shall pay the balance or sum to the owner of the goods.

"(4) A wharfinger or warehouseman shall, by any payment under this section, be discharged from all liability in respect thereof."

Sale of goods by warehouseman.

Section 497 enacts that "(1) If the lien is not discharged, and no deposit is made as aforesaid, the wharfinger or warehouseman may, and, if required by the shipowner, shall, at the expiration of ninety days from the time when the goods were placed in his custody, or, if the goods are of a perishable nature, at such earlier period as in his discretion he thinks fit, sell by public auction, either for home use or for exportation, the goods or so much thereof as may be necessary to satisfy the charges hereinafter mentioned.

"(2) Before making the sale the wharfinger or warehouseman shall give notice thereof by advertisement in two local newspapers circulating in the neighbourhood, or in one daily newspaper published in London, and in one local newspaper, and also, if the address of the owner of the goods has been stated on the manifest of the cargo, or on any of the documents which have come into possession of the wharfinger or warehouseman, or is otherwise known to him, send notice of the sale to the owner of the goods by post.

"(3) The title of a *bona-fide* purchaser of the goods shall not be invalidated by reason of the omission to send the notice required by this section, nor shall any

such purchaser be bound to inquire whether the notice has been sent."

It has been held by the Court of Appeal in New York that, where the shipowner warehouses the goods in the warehouse of a stranger, contrary to the contract, he thereby puts an end to his lien for freight; but that where the consignee is in default, in not receiving the goods, the shipowner may store them, either in his own warehouse or in his own name in the warehouse of a stranger, without losing his lien. The creation of a further lien for warehouse charges, made necessary in such a case by the default of the owner of the goods, was held not to affect the shipowner's lien (1).

Unpaid vendor's lien.

The plaintiff shipped a cargo in his own vessel to be carried on the ship's account, freight at the nominal rate of one shilling per ton being inserted in the bill of lading, which contained the usual exceptions of perils of the seas. Subsequently he sold the cargo whilst in transit for 65s. per 500 lbs., "including freight and insurance, freight to be reckoned at 60s. per ton." After intermediate sales the defendants ultimately purchased the cargo whilst still in transit on the same terms as to freight. The ship on arrival at the port of discharge was ordered to Y., where she discharged her cargo. The defendants, with notice of the terms of the plaintiff's contract, paid a sum on account of freight at 60s. per ton and received the cargo. The quantity of cargo delivered was less than that stated in the bill of lading. In an action by the plaintiff to recover the balance alleged to be due for freight at the rate of 60s. per ton upon all the cargo delivered, the defendants claimed to set off £193 on account of short delivery. At the trial, the jury being of opinion that the short delivery was occasioned by the excepted perils, found for the plaintiff for the amount claimed. It was held, that the 60s. per ton agreed to be treated as freight in the plaintiff's contract for sale was unpaid purchase-

(1) *Western Transport Company* v. *Barber*, 56 N.Y. 444. See also *Levy* v. *Barnard*, 8 Taunt. 149; *Gunn* v. *Bolckow*, L.R. 10 Ch. 491; *Sweet* v. *Pym*, 1 East. 4; *Hartley* v. *Hitchcock*, 1 Stark. 408; *Wallace* v. *Woodgate*, R. and M. 193.

money, in respect of which the plaintiff had a lien on the cargo as unpaid vendor; that from the defendants' conduct a contract by them might be implied to discharge the lien, and therefore the plaintiff was entitled to recover (1).

How lien may be lost.

If the shipowner takes a bill of exchange for the freight, payable at a future date, he will lose his lien, but the lien will revive if the bill is dishonoured before the goods have been delivered (2).

If, on the charterer becoming insolvent and failing to perform his part of the contract, the shipowner collects the bill of lading freight and delivers the cargo to the consignees, he can keep the freight so collected under his lien (3).

Expenses of preserving lien.

A shipowner is not necessarily entitled to charge the consignee of goods with the warehousing charges or other expenses he may have incurred in preserving his lien (4). But where a shipowner reasonably keeps cargo on board to preserve his lien for freight, etc., he may claim demurrage during the detention; or time-freight where the ship is under a time-charter (5). But in America it has been held that demurrage cannot be claimed during the enforcement of the lien unless timely notice has been given, so as to enable the charterer to find security (6).

Where the consignee and the owner of a cargo fails to pay or tender the freight due on the discharge of the cargo, the carrier, to preserve his lien, is authorised to retain and store sufficient of the cargo to pay such freight, and the expense of storage and the loss of the use of the commodity must be borne by the owner (7).

(1) *Swan* v. *Barber*, 28 W.R. 563. See also *Weguelin* v. *Cellier*, L.R. 6 H.L. 286.

(2) *Hewison* v. *Guthrie*, 2 Bing. N.C. 755; *Gunn* v. *Bolckow*, L.R. 10 Ch. 491; *Horncastle* v. *Farran*, 3 B. and A. 497; *Bunney* v. *Poynts*, 4 B. and Ad. 568; *Jacobs* v. *Latour*, 5 Bing. 130; *Boardman* v. *Sill*, 1 Camp. 409, *n.*; *Dirks* v. *Richards*; *White* v. *Gainer*, 2 Bing. 23.

(3) *Christie* v. *Lewis* (1821), 2 B. and B. 410.

(4) *Somes* v. *British Empire Shipping Company*, 27 L.J. Q.B. 397.

(5) *Moller* v. *Young*, 24 L.J. Q.B. 217; *Thorsen* v. *M'Dowall*, 19 Sess. Cas. (4th), 743.

(6) *Ten Thousand and Eighty-two Oak Ties*, 87 Fed. Rep. 935. See Stephens or Demurrage.

(7) *The Asiatic Prince*, 1900, 103 Fed. Rep. 676. See *Houlder* v. *General*

Seamen have a maritime lien on freight due from sub-charterers to the charterers of a ship, and can arrest the cargo for the purpose of enforcing such lien. The lien of seamen for wages ranks before a claim in respect of payments for the towage of the ship from sea to an inland port, and the light dues and dock dues (1).

Lien for wages of seamen on freight due.

The fact that the master is turned out of possession of the vessel by its being captured does not deprive him of his lien for the freight in case of her recapture (2).

Master not deprived of lien where vessel recaptured.

The master of a ship has no right to detain goods for wharfage, if the consignee tenders the freight, and requires them to be delivered over the ship's side (3).

Goods cannot be detained for wharfage.

The master of a ship has a lien on the luggage of a passenger for his passage-money (4).

Certain sacks of flour were received by an American railway company to be carried under three similar through bills of lading from inland in the United States to London, part of the transit being by railway to the port, and the rest by the defendants' steamships to London, to be there delivered upon payment of the through freight. Each through bill of lading was signed on behalf of the railway company, and the defendants severally and not jointly. By a clause in the through bill of lading, as regards the inland service, the contract was executed and accomplished, and all liability thereunder terminated on delivery of the property to the steamship, "and the inland freight charges shall be a first lien, due and payable by the steamship company." By a clause in the through bill of lading, as regards the carriage by sea, freight was to be paid on gross weight landed from the steamship unless otherwise agreed to or therein otherwise provided, or unless the carrier elected to take the freight on the bill of lading weight. By a clause in the defendants'

Steam Navigation Company, 3 F. and F. 170; *Great Northern Railway Company* v. *Swaffield*, L.R. 9 Ex. 132; *Stewart* v. *Rogerson*, 6 C.P. 424; *Hicks* v. *Rodocanachi*, 1891, 2 Q.B., p. 632; per Crompton, J., *Erichsen* v. *Barkworth*, 28 L.J. Ex., p. 96.

(1) *The Andalina*, 1886, 12 P.D. 1.

(2) *Cheesman, Ex parte*, 2 Eden. 181.

(3) *Bishop* v. *Ware*, 1813, 3 Camp. 360.

(4) *Wolf* v. *Summers* (1811), 2 Camp. 631.

regular bill of lading, which was incorporated in the through bill of lading, "when the goods are carried at a through rate of freight, the inland proportion thereof, together with the other charges of every kind (if any), are due on delivery of the goods to the ocean steamship, and the shipowner or his agent shall have a first lien on the goods in whole or in part until payment thereof." The defendants paid the railway company the inland charges on all the sacks of flour and shipped them; but afterwards the ship ran aground, and some of the flour was damaged and sold, and the rest had to be transhipped. On arrival of the rest of the sacks in London, the defendants were paid the through freight thereon, but claimed also against the plaintiffs, the indorsees of the through bills of lading, a lien on this flour for the inland charges paid on the sacks sold and not delivered. The plaintiffs paid the claim under protest, and brought this action to recover the amount. It was held that the defendants were entitled to judgment, and that they had a lien on the flour delivered in London under any one bill of lading for the amount of the inland charges which they had paid in respect of the flour under that bill of lading which was sold and not delivered (1).

(1) *The Hibernian*, 95 L.T. 395.

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